BETTER TRAINING, EFFICIENCY AND ACCOUNTABILITY: SERVICES ACQUISITION REFORM FOR THE 21ST CENTURY

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 1837

TO IMPROVE THE FEDERAL ACQUISITION WORKFORCE AND THE PROCESS FOR THE ACQUISITION OF SERVICES BY THE FEDERAL GOVERNMENT, AND FOR OTHER PURPOSES

APRIL 30, 2003

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BETTER TRAINING, EFFICIENCY AND ACCOUNTABILITY: SERVICES ACQUISITION REFORM FOR THE 21ST CENTURY

WEDNESDAY, APRIL 30, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. Tom Davis of Virginia (chairman of the committee) presiding.

Present: Representatives Tom Davis of Virginia, Ose, Lewis, Jo Ann Davis of Virginia, Schrock, Deal, Turner, Carter, Blackburn, Waxman, Maloney, Cummings, Kucinich, Davis of Illinois, Tierney, Clay, Watson, Sanchez, Ruppersberger, Norton, and Cooper.

Staff present: Melissa Wojciak, deputy staff director; Keith Ausbrook, chief counsel; Ellen Brown, legislative director and senior policy counsel; Howie Denis and Jim Moore, counsels; David Marin, director of communications; Scott Kopple, deputy director of communications; Edward Kidd, professional staff member; Teresa Austin, chief clerk; Corinne Zaccagnini, chief information officer; Brien Beattie, staff assistant; Rob Borden, parliamentarian; Phil Schiliro, minority staff director; Michelle Ash, minority counsel; Mark Stephenson, minority professional staff member; Earley Green, minority chief clerk; Jean Gosa, minority assistant clerk; and Cecelia Morton, minority office manager.

Chairman TOM DAVIS. Good morning. Thank you for bearing with us. The committee will come to order.

Today's legislative hearing is on H.R. 1837, the Services Acquisition Reform Act of 2003 [SARA], that I recently introduced along with Congressman Duncan Hunter of the House Armed Services Committee.

This hearing will build on hearings conducted during the last Congress on H.R. 3832, the Services Acquisition Reform Act of 2002, and on barriers Government agencies face in acquiring the goods and services necessary to meet mission objectives. The goal of this hearing is to discuss ways to provide the Federal Government greater access to the commercial marketplace.

The reforms of the early to mid-nineties have resulted in significant streamlining, cost savings, access to technological advancements, and reduced procurement cycles, which have improved the quality of products and services purchased by the Federal Government. Unfortunately, the Government is still not able to approach the best practices of industry, particularly regarding the acquisi-

tion of cutting-edge information technology and management services.

Over the past decade, the growth of services acquisition, both in terms of the percentage of the total tax dollars spent by the Government and in raw numbers, has been staggering. Each year our Government spends well over $200 billion buying goods and services. According to the GAO, in 2001, this cost totaled about 23 percent of the Government's discretionary resources. In the same year the Government spent more than $135 billion for services, an increase of about 24 percent since 1990, establishing services as our largest single spending category.

The existing reforms were rooted in the late eighties and early nineties context of products and major systems and scarcely touched service acquisition. We are now faced with Federal spending patterns that have undergone a vast change in a relatively short time. With the advent of the war against terrorism, the change will accelerate because of the critical need for the rapid acquisition of high-tech services and management expertise.

The new service-oriented, high-technology environment has simply overwhelmed the current system. Right now we simply do not have the right people with the right tools and the right skills to manage the acquisition of the services and technology that the Government so desperately needs.

Difficulties in managing the Government's acquisition system caused GAO to place acquisition management on its high-risk list. The current system, improved though it may be, simply is inadequate to leverage the best and most innovative services and products our vigorous private sector economy has to offer. It has not kept up with the dynamics of an economy that has over the last few years become increasingly service and technology-oriented. Without change, the current system cannot support the President's vision, expressed in his management agenda, of a Government that is well-run, results-oriented, citizen-centered, and market-based.

SARA is targeted at the root causes of our current dilemma. SARA will put the tools needed to access the commercial service and technology market in the hands of a trained work force that will have the discretion necessary to choose the best value for the Government and be held accountable for those choices.

SARA consists of a carefully crafted set of interrelated legislative proposals that will address the multiple deficiencies plaguing Government acquisitions today.

One, the lack of up-to-date, comprehensive training for our acquisition professionals.

Two, the inability of the current Government structure to reflect businesslike practices by integrating the acquisition function into the overall agency mission and facilitating cross-agency acquisitions and information-sharing.

And, three, the lack of good tools and incentives to encourage the participation of the best commercial firms into the Government marketplace.

These proposals are grounded on the Service Acquisition Reform Act of 2002 from last Congress and the acquisition hearings that we held last year in the Government Reform Subcommittee on

Technology and Procurement Policy. We have made progress since then.

The Congress passed the Homeland Security Act and the E-Government Act. The Homeland Security Act contains some important procurement flexibilities while the E-Government contains limited share-in-savings authority and cooperative purchasing authority to expand the GSA schedules to State and local governments.

Further, we have received the benefit of comments from a wide variety of sources on the original version of SARA. We have made a number of changes based on these experiences and comments.

The hearing this morning will help us focus on the reform initiatives included in SARA to enable Federal agencies to update management practices and develop a strategic approach for contracting services. Clearly, recent events have shown these agencies must change how they do business in order to meet homeland security goals. SARA is intended to streamline procurement cycles and integrate agency mission goals and acquisition goals in order to help agencies meet the challenges presented by the war on terrorism.

I look forward to the testimony from our two panels of expert witnesses. As the legislation makes its way through the legislative process, we hope to tap the wisdom and the knowledge of both public and private sectors that is so well-represented by today's witnesses.

[The prepared statement of Chairman Tom Davis and the text of H.R. 1837 follow:]

Opening Statement of Chairman Tom Davis
Legislative Hearing on H.R. 1837, The Services Acquisition Reform Act of 2003.
"Better Training, Efficiency and Accountability:
Services Acquisition Reform for the 21st Century"

Committee on Government Reform
April 30, 2003 at 10:00 a.m.
Room 2154, Rayburn House Office Building

Good morning and welcome to today's legislative hearing on H.R. ,the Services Acquisition Reform Act of 2003 (SARA), that I recently introduced along with Chairman Duncan Hunter of the House Armed Services Committee. This hearing will build on hearings conducted last Congress on H.R. 3832, the Services Acquisition Reform Act of 2002, and on barriers government agencies face in acquiring the goods and services necessary to meet mission objectives. The goal of this hearing is to discuss ways to provide the federal government greater access to the commercial marketplace. The reforms of the early to mid-90s have resulted in significant streamlining, cost savings, access to technological advancements, and reduced procurement cycles, which have improved the quality of products and services purchased by the federal government. Unfortunately, the government is still not able to approach the best practices of industry, particularly regarding the acquisition of cutting edge information technology and management services.

Over the past decade, the growth of services acquisition both in terms of the percentage of the total tax dollars spent by the government and in raw numbers has been staggering. Each year our government spends well over $200 billion buying goods and services. According to the General Accounting Office (GAO), in 2001, this constituted about 23 percent of the government's discretionary resources. In the same year, the government spent more than $135 billion for services – an increase of about 24 percent since 1990 – establishing services as our largest single spending category.

The existing reforms were rooted in the late 80s and early 90s context of products and major systems and scarcely touched services acquisition. We are now faced with federal spending patterns that have undergone a vast change in a relatively short time. With the advent of the war against terror, the change will accelerate because of the critical need for the rapid acquisition of high tech services and management expertise. The new service-oriented, high technology environment has simply overwhelmed the current system. Right now we simply do not have the right people with the right tools and the right skills to manage the acquisition of the services and technology that the government so desperately needs. Difficulties in managing the government's acquisition system caused GAO to place acquisition management on its high-risk list.

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SARA is targeted at the root causes of our current dilemma. SARA will put the tools needed to access the commercial service and technology market in the hands of a trained workforce that will have the discretion necessary to chose the best value for the government and be held accountable for those choices. SARA consists of a carefully crafted set of interrelated legislative proposals that will address the multiple deficiencies plaguing government acquisition today: (1) the lack of up-to- date comprehensive training for our acquisition professionals; (2) the inability of the current government structure to reflect business-like practices by integrating the acquisition function into the overall agency mission, and facilitating cross-agency acquisitions and information sharing; and (3) the lack of good tools and incentives to encourage the participation of the best commercial firms in the government market.

These proposals are grounded on the Services Acquisition Reform Act of 2002 from last Congress and the acquisition hearings I held last year as chairman of the Government Reform Subcommittee on Technology and Procurement Policy. We have made progress since then. The Congress has passed the Homeland Security Act and the E-Government Act. The Homeland Security Act contains some important procurement flexibilities, while the E-Government Act contains limited share-in-savings authority and cooperative purchasing authority to expand the General Services Administration schedules to state and local governments. Further, we have received the benefit of comments from a variety of sources on the original version of SARA. We have made a number of changes based on these experiences and comments.

The hearing this morning will help us focus the reform initiatives included in SARA to enable federal agencies to update management practices and develop a strategic approach for contracting for services. Clearly, recent events have shown that agencies must change how they do business in order to meet homeland security goals. SARA is intended to streamline procurement cycles and integrate agency mission goals with acquisition goals in order to help agencies meet the challenges presented by the war on terrorism.

I look forward to the testimony from our two panels of expert witnesses. As the legislation makes its way through the legislative process, we hope to tap the wisdom and knowledge of both the public and private sectors that is so well represented by today's witnesses.

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108TH CONGRESS
1ST SESSION

H. R. 1837

To improve the Federal acquisition workforce and the process for the acquisition of services by the Federal Government, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 29, 2003

Mr. TOM DAVIS of Virginia (for himself and Mr. HUNTER) introduced the following bill; which was referred to the Committee on Government Reform, and in addition to the Committee on Armed Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To improve the Federal acquisition workforce and the process for the acquisition of services by the Federal Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Services Acquisition Reform Act of 2003".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. EXECUTIVE AGENCY DEFINED.

In this Act, the term "executive agency" has the meaning given that term in section 4(1) of the Office of

Federal Procurement Policy Act (41 U.S.C. 403(1)), unless specifically stated otherwise.

TITLE I—ACQUISITION WORKFORCE AND TRAINING

SEC. 101. DEFINITION OF ACQUISITION.

Section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) is amended by adding at the end the following:

"(16) The term 'acquisition'—

"(A) means the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established in consultation with the chief acquisition officer of the executive agency; and

"(B) includes—

"(i) the process of acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated;

"(ii) the description of requirements to satisfy agency needs;

"(iii) solicitation and selection of sources;

"(iv) award of contracts;

"(v) contract performance;

"(vi) contract financing:

"(vii) management and measurement of contract performance through final delivery and payment; and

"(viii) technical and management functions directly related to the process of fulfilling agency requirements by contract.".

SEC. 102. ACQUISITION WORKFORCE TRAINING FUND.

(a) PURPOSES.—The purposes of this section are to ensure that the Federal acquisition workforce—

(1) adapts to fundamental changes in the nature of Federal Government acquisition of property and services associated with the changing roles of the Federal Government; and

(2) acquires new skills and a new perspective to enable it to contribute effectively in the changing environment of the 21st century.

(b) ESTABLISHMENT OF FUND.—Section 37 of the Office of Federal Procurement Policy Act (41 U.S.C. 433)

is amended by adding at the end of subsection (h) the following new paragraph:

"(3) ACQUISITION WORKFORCE TRAINING FUND.—(A) The Administrator of General Services shall establish an acquisition workforce training fund. The Administrator shall manage the fund through the Federal Acquisition Institute to support the training of the acquisition workforce of the executive agencies other than the Department of Defense. The Administrator shall consult with the Administrator for Federal Procurement Policy in managing the fund.

"(B) There shall be credited to the acquisition workforce training fund 5 percent of the fees collected by executive agencies under the following contracts:

"(i) Governmentwide task and delivery-order contracts entered into under sections 2304a and 2304b of title 10, United States Code, or sections 303H and 303I of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h and 253i).

"(ii) Governmentwide contracts for the acquisition of information technology as defined in section 11101 of title 40, United States

Code, and multiagency acquisition contracts for such technology authorized by section 11314 of such title.

"(iii) Multiple-award schedule contracts entered into by the Administrator of General Services.

"(C) The head of an executive agency that administers a contract described in subparagraph (B) shall remit to the General Services Administration the amount required to be credited to the fund with respect to such contract at the end of each quarter of the fiscal year.

"(D) The Administrator of General Services, through the Office of Federal Acquisition Policy, shall ensure that funds collected for training under this section are not used for any purpose other than the purpose specified in subparagraph (A).

"(E) Amounts credited to the fund shall be in addition to funds requested and appropriated for education and training referred to in paragraph (1).

"(F) Amounts credited to the fund shall remain available until expended.".

SEC. 103. GOVERNMENT-INDUSTRY EXCHANGE PROGRAM.

(a) IN GENERAL.—Subpart B of part III of title 5, United States Code, is amended by adding at the end the following:

"CHAPTER 38—ACQUISITION PROFESSIONAL EXCHANGE PROGRAM

"§ 3801. Definitions

"For purposes of this chapter—

"(1) the term 'agency'—

"(A) subject to subparagraph (B), means an executive agency; and

"(B) does not include—

"(i) the General Accounting Office;

"(ii) an Office of Inspector General of an establishment or a designated Federal entity established under the Inspector General Act of 1978; and

"(iii) the Defense Contract Audit Agency referred to in section 2313(b) of title 10; and

"(2) the term 'detail' means—

"(A) the assignment or loan of an employee of an agency to a private sector organization without a change of position from the agency that employs the individual, or

"(B) the assignment or loan of an employee of a private sector organization to an agency without a change of position from the private sector organization that employs the individual,

whichever is appropriate in the context in which such term is used.

"§ 3802. General provisions

"(a) ASSIGNMENT AUTHORITY.—On request from or with the agreement of a private sector organization, and with the consent of the employee concerned, the head of an agency may arrange for the assignment of an employee of the agency to a private sector organization or an employee of a private sector organization to the agency. An eligible employee is an individual who—

"(1) works in the field of Federal acquisition or acquisition management;

"(2) is considered an exceptional performer by the individual's current employer; and

"(3) is expected to assume increased acquisition management responsibilities in the future.

An employee of an agency shall be eligible to participate in this program only if the employee is employed at the GS–11 level or above (or equivalent) and is serving under a career or career-conditional appointment or an appointment of equivalent tenure in the excepted service.

"(b) AGREEMENTS.—Each agency that exercises its authority under this chapter shall provide for a written agreement between the agency and the employee concerned regarding the terms and conditions of the employee's assignment. In the case of an employee of the agency, the agreement shall—

"(1) require the employee to serve in the civil service, upon completion of the assignment, for a period equal to the length of the assignment; and

"(2) provide that, in the event the employee fails to carry out the agreement (except for good and sufficient reason, as determined by the head of the agency from which assigned) the employee shall be liable to the United States for payment of all expenses of the assignment.

An amount under paragraph (2) shall be treated as a debt due the United States.

"(c) TERMINATION.—Assignments may be terminated by the agency or private sector organization concerned for any reason at any time.

"(d) DURATION.—Assignments under this chapter shall be for a period of between 6 months and 1 year, and may be extended in 3-month increments for a total of not more than 1 additional year, except that no assignment under this chapter may commence after the end of the 5-year period beginning on the date of the enactment of this chapter.

"(e) ASSISTANCE.—The Administrator for Federal Procurement Policy, by agreement with the Office of Personnel Management, may assist in the administration of this chapter, including by maintaining lists of potential candidates for assignment under this chapter, establishing mentoring relationships for the benefit of individuals who are given assignments under this chapter, and publicizing the program.

"(f) CONSIDERATIONS.—In exercising any authority under this chapter, an agency shall take into consideration—

"(1) the need to ensure that small business concerns are appropriately represented with respect to the assignments described in sections 3803 and 3804, respectively; and

"(2) how assignments described in section 3803 might best be used to help meet the needs of the

agency for the training of employees in acquisition management.

"§ 3803. Assignment of employees to private sector organizations

"(a) IN GENERAL.—An employee of an agency assigned to a private sector organization under this chapter is deemed, during the period of the assignment, to be on detail to a regular work assignment in his agency.

"(b) COORDINATION WITH CHAPTER 81.—Notwithstanding any other provision of law, an employee of an agency assigned to a private sector organization under this chapter is entitled to retain coverage, rights, and benefits under subchapter I of chapter 81, and employment during the assignment is deemed employment by the United States, except that, if the employee or the employee's dependents receive from the private sector organization any payment under an insurance policy for which the premium is wholly paid by the private sector organization, or other benefit of any kind on account of the same injury or death, then, the amount of such payment or benefit shall be credited against any compensation otherwise payable under subchapter I of chapter 81.

"(c) REIMBURSEMENTS.—The assignment of an employee to a private sector organization under this chapter may be made with or without reimbursement by the pri-

vate sector organization for the travel and transportation expenses to or from the place of assignment, subject to the same terms and conditions as apply with respect to an employee of a Federal agency or a State or local government under section 3375, and for the pay, or a part thereof, of the employee during assignment. Any reimbursements shall be credited to the appropriation of the agency used for paying the travel and transportation expenses or pay.

"(d) TORT LIABILITY; SUPERVISION.—The Federal Tort Claims Act and any other Federal tort liability statute apply to an employee of an agency assigned to a private sector organization under this chapter. The supervision of the duties of an employee of an agency so assigned to a private sector organization may be governed by an agreement between the agency and the organization.

"(e) SMALL BUSINESS CONCERNS.—

"(1) IN GENERAL.—The head of each agency shall take such actions as may be necessary to ensure that, of the assignments made under this chapter from such agency to private sector organizations in each year, at least 20 percent are to small business concerns.

"(2) DEFINITIONS.—For purposes of this subsection—

"(A) the term 'small business concern' means a business concern that satisfies the definitions and standards specified by the Administrator of the Small Business Administration under section 3(a)(2) of the Small Business Act (as from time to time amended by the Administrator);

"(B) the term 'year' refers to the 12-month period beginning on the date of the enactment of this chapter, and each succeeding 12-month period in which any assignments under this chapter may be made; and

"(C) the assignments 'made' in a year are those commencing in such year.

"(3) REPORTING REQUIREMENT.—An agency which fails to comply with paragraph (1) in a year shall, within 90 days after the end of such year, submit a report to the Committees on Government Reform and Small Business of the House of Representatives and the Committees on Governmental Affairs and Small Business of the Senate. The report shall include—

"(A) the total number of assignments made under this chapter from such agency to private sector organizations in the year;

"(B) of that total number, the number (and percentage) made to small business concerns; and

"(C) the reasons for the agency's noncompliance with paragraph (1).

"(4) EXCLUSION.—This subsection shall not apply to an agency in any year in which it makes fewer than 5 assignments under this chapter to private sector organizations.

"§ 3804. Assignment of employees from private sector organizations

"(a) IN GENERAL.—An employee of a private sector organization assigned to an agency under this chapter is deemed, during the period of the assignment, to be on detail to such agency.

"(b) TERMS AND CONDITIONS.—An employee of a private sector organization assigned to an agency under this chapter—

"(1) may continue to receive pay and benefits from the private sector organization from which he is assigned;

"(2) is deemed, notwithstanding subsection (a), to be an employee of the agency for the purposes of—

"(A) chapter 73;

"(B) sections 201, 203, 205, 207, 208, 209, 603, 606, 607, 643, 654, 1905, and 1913 of title 18;

"(C) sections 1343, 1344, and 1349(b) of title 31;

"(D) the Federal Tort Claims Act and any other Federal tort liability statute;

"(E) the Ethics in Government Act of 1978;

"(F) section 1043 of the Internal Revenue Code of 1986; and

"(G) section 27 of the Office of Federal Procurement Policy Act;

"(3) may not have access to any trade secrets or to any other nonpublic information which is of commercial value to the private sector organization from which he is assigned; and

"(4) is subject to such regulations as the President may prescribe.

The supervision of an employee of a private sector organization assigned to an agency under this chapter may be governed by agreement between the agency and the private sector organization concerned. Such an assignment may be made with or without reimbursement by the agency for the pay, or a part thereof, of the employee during the pe-

riod of assignment, or for any contribution of the private sector organization to employee benefit systems.

"(c) COORDINATION WITH CHAPTER 81.—An employee of a private sector organization assigned to an agency under this chapter who suffers disability or dies as a result of personal injury sustained while performing duties during the assignment shall be treated, for the purpose of subchapter I of chapter 81, as an employee as defined by section 8101 who had sustained the injury in the performance of duty, except that, if the employee or the employee's dependents receive from the private sector organization any payment under an insurance policy for which the premium is wholly paid by the private sector organization, or other benefit of any kind on account of the same injury or death, then, the amount of such payment or benefit shall be credited against any compensation otherwise payable under subchapter I of chapter 81.

"(d) PROHIBITION AGAINST CHARGING CERTAIN COSTS TO THE FEDERAL GOVERNMENT.—A private sector organization may not charge the Federal Government, as direct or indirect costs under a Federal contract, the costs of pay or benefits paid by the organization to an employee assigned to an agency under this chapter for the period of the assignment.

"§ 3805. Reporting requirement

"(a) IN GENERAL.—The Office of Personnel Management shall, not later than April 30 and October 31 of each year, prepare and submit to the Committee on Government Reform of the House of Representatives and the Committee on Governmental Affairs of the Senate a semiannual report summarizing the operation of this chapter during the immediately preceding 6-month period ending on March 31 and September 30, respectively.

"(b) CONTENT.—Each report shall include, with respect to the 6-month period to which such report relates—

"(1) the total number of individuals assigned to, and the total number of individuals assigned from, each agency during such period;

"(2) a brief description of each assignment included under paragraph (1), including—

"(A) the name of the assigned individual, as well as the private sector organization and the agency (including the specific bureau or other agency component) to or from which such individual was assigned;

"(B) the respective positions to and from which the individual was assigned, including the duties and responsibilities and the pay grade or level associated with each; and

"(C) the duration and objectives of the individual's assignment; and

"(3) such other information as the Office considers appropriate.

"(c) PUBLICATION.—A copy of each report submitted under subsection (a)—

"(1) shall be published in the Federal Register; and

"(2) shall be made publicly available on the Internet.

"(d) AGENCY COOPERATION.—On request of the Office, agencies shall furnish such information and reports as the Office may require in order to carry out this section.

"§ 3806. Regulations

"The Director of the Office of Personnel Management shall prescribe regulations for the administration of this chapter.".

(b) REPORT.—Not later than 4 years after the date of the enactment of this Act, the General Accounting Office shall prepare and submit to the Committee on Government Reform of the House of Representatives and the Committee on Governmental Affairs of the Senate a report on the operation of chapter 38 of title 5, United States

Code (as added by this section). Such report shall include—

(1) an evaluation of the effectiveness of the program established by such chapter; and

(2) a recommendation as to whether such program should be continued (with or without modification) or allowed to lapse.

(c) CLERICAL AMENDMENT.—The table of contents at the beginning of part III of title 5, United States Code, is amended by inserting after the item relating to chapter 37 the following:

"38. Acquisition Professional Exchange Program .... 3801".

(d) ETHICS PROVISIONS.—

(1) ONE-YEAR RESTRICTION ON CERTAIN COMMUNICATIONS.—Section 207(c)(2)(A)(v) of title 18, United States Code, is amended by inserting "or 38" after "chapter 37".

(2) DISCLOSURE OF CONFIDENTIAL INFORMATION.—Section 1905 of title 18, United States Code, is amended by inserting "or 38" after "chapter 37".

(3) CONTRACT ADVICE.—Section 207(l) of title 18, United States Code, is amended—

(A) in the subsection heading, by striking "DETAILS.—" and inserting "DETAILEES.—"; and

(B) by inserting "or 38" after "chapter 37".

(4) RESTRICTION ON DISCLOSURE OF PROCUREMENT INFORMATION.—Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) is amended in the last sentence of subsection (a)(1) by inserting "or 38" after "chapter 37".

(e) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) AMENDMENTS TO TITLE 5, UNITED STATES CODE.—Title 5, United States Code, is amended—

(A) in section 3111(d), by inserting "or 38" after "chapter 37";

(B) in section 7353(b)(4), by inserting "or 38" after "chapter 37".

(2) AMENDMENT TO TITLE 18, UNITED STATES CODE.—Section 209(g) of title 18, United States Code, is amended—

(A) in paragraph (1), by inserting "or 38" after "chapter 37"; and

(B) by amending paragraph (2) to read as follows:

"(2) For purposes of this subsection, the term 'agency'—

"(A) with respect to assignments under chapter 37 of title 5, means an agency (as defined in section 3701 of title 5) and the Office of the Chief Technology Officer of the District of Columbia; and

"(B) with respect to assignments under chapter 38 of title 5, means an agency (as defined by section 3801 of title 5).".

(3) ELIGIBILITY FOR THRIFT SAVINGS PLAN.—Section 125(c)(1)(D) of Public Law 100–238 (101 Stat. 1757; 5 U.S.C. 8432 note) is amended by inserting "or 38" after "chapter 37".

SEC. 104. ACQUISITION WORKFORCE RECRUITMENT AND RETENTION PROGRAM.

(a) AUTHORITY TO CARRY OUT PROGRAM.—For purposes of sections 3304, 5333, and 5753 of title 5, United States Code, the head of a department or agency of the United States (including the Secretary of Defense) may determine that certain Federal acquisition positions are "shortage category" positions in order to recruit and appoint directly to positions of employment in the department or agency highly qualified persons, such as any person who—

(1) holds a bachelor's degree from an accredited institution of higher education;

(2) holds, from an accredited law school or an accredited institution of higher education—

(A) a law degree; or

(B) a masters or equivalent degree in business administration, public administration, or systems engineering; or

(3) has significant experience with commercial acquisition practices, terms, and conditions.

(b) REQUIREMENTS.—The exercise of authority to take a personnel action under this section shall be subject to policies prescribed by the Office of Personnel Management that govern direct recruitment, including policies requiring appointment of a preference eligible who satisfies the qualification requirements.

(c) TERMINATION OF AUTHORITY.—The head of a department or agency may not appoint a person to a position of employment under this section after September 30, 2007.

(d) REPORT.—Not later than March 31, 2007, the Administrator for Federal Procurement Policy shall submit to Congress a report on the implementation of this section. The report shall include—

(1) the Administrator's assessment of the efficacy of the exercise of the authority provided in this

section in attracting employees with unusually high qualifications to the acquisition workforce; and

(2) any recommendations considered appropriate by the Administrator on whether the authority to carry out the program should be extended.

SEC. 105. ARCHITECTURAL AND ENGINEERING ACQUISITION WORKFORCE.

The Administrator for Federal Procurement Policy, in consultation with the Secretary of Defense, the Administrator of General Services, and the Director of the Office of Personnel Management, shall develop and implement a plan to ensure that the Federal Government maintains the necessary capability with respect to the acquisition of architectural and engineering services to—

(1) ensure that Federal Government employees have the expertise to determine agency requirements for such services;

(2) establish priorities and programs (including acquisition plans);

(3) establish professional standards;

(4) develop scopes of work; and

(5) award and administer contracts for such services.

TITLE II—ADAPTATION OF BUSINESS ACQUISITION PRACTICES

Subtitle A—Adaptation of Business Management Practices

SEC. 201. CHIEF ACQUISITION OFFICERS.

(a) APPOINTMENT OF CHIEF ACQUISITION OFFICERS.—(1) Section 16 of the Office of Federal Procurement Policy Act (41 U.S.C. 414) is amended to read as follows:

"SEC. 16. AGENCY CHIEF ACQUISITION OFFICERS.

"(a) ESTABLISHMENT OF AGENCY CHIEF ACQUISITION OFFICERS.—The head of each executive agency (other than the Department of Defense) shall appoint or designate a non-career employee as Chief Acquisition Officer for the agency, who shall—

"(1) have acquisition management as that official's primary duty; and

"(2) advise and assist the head of the executive agency and other agency officials to ensure that the mission of the executive agency is achieved through the management of the agency's acquisition activities.

"(b) AUTHORITY AND FUNCTIONS OF AGENCY CHIEF ACQUISITION OFFICERS.—The functions of each Chief Acquisition Officer shall include—

"(1) monitoring the performance of acquisition activities and acquisition programs of the executive agency, evaluating the performance of those programs on the basis of applicable performance measurements, and advising the head of the executive agency regarding the appropriate business strategy to achieve the mission of the executive agency;

"(2) increasing the use of full and open competition in the acquisition of property and services by the executive agency by establishing policies, procedures, and practices that ensure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the best value considering the nature of the property or service procured;

"(3) making acquisition decisions consistent with all applicable laws and establishing clear lines of authority, accountability, and responsibility for acquisition decisionmaking within the executive agency;

"(4) managing the direction of acquisition policy for the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency;

"(5) developing and maintaining an acquisition career management program in the executive agency to ensure that there is an adequate professional workforce; and

"(6) as part of the strategic planning and performance evaluation process required under section 306 of title 5, United States Code, and sections 1105(a)(28), 1115, 1116, and 9703 of title 31, United States Code—

"(A) assessing the requirements established for agency personnel regarding knowledge and skill in acquisition resources management and the adequacy of such requirements for facilitating the achievement of the performance goals established for acquisition management;

"(B) in order to rectify any deficiency in meeting such requirements, developing strategies and specific plans for hiring, training, and professional development; and

"(C) reporting to the head of the executive agency on the progress made in improving acquisition management capability.".

(2) The item relating to section 16 in the table of contents in section 1(b) of such Act is amended to read as follows:

"Sec. 16. Chief Acquisition Officers.".

(b) REFERENCES TO SENIOR PROCUREMENT EXECUTIVE.—(1) The Office of Federal Procurement Policy Act (41 U.S.C. 403 et seq.), title III of the Federal Property and Administrative Services Act of 1949, and title 10, United States Code, are each amended by striking "senior procurement executive" and "senior procurement executives" each place such terms appear and inserting "Chief Acquisition Officer" and "Chief Acquisition Officers", respectively.

(2) Any reference to a senior procurement executive of a department or agency of the United States in any other provision of law or regulation, document, or record of the United States shall be deemed to be a reference to the Chief Acquisition Officer of the department or agency.

(c) TECHNICAL CORRECTION.—Section 1115(a) of title 31, United States Code, is amended by striking "section 1105(a)(29)" and inserting "section 1105(a)(28)".

SEC. 202. CHIEF ACQUISITION OFFICERS COUNCIL.

(a) ESTABLISHMENT OF COUNCIL.—The Office of Federal Procurement Policy Act (41 U.S.C. 403 et seq.) is amended by inserting after section 16 the following new section:

"SEC. 16A. CHIEF ACQUISITION OFFICERS COUNCIL.

"(a) ESTABLISHMENT.—There is established in the executive branch a Chief Acquisition Officers Council.

"(b) MEMBERSHIP.—The members of the Council shall be as follows:

"(1) The Deputy Director for Management of the Office of Management and Budget, who shall act as Chairman of the Council.

"(2) The Administrator for Federal Procurement Policy.

"(3) The chief acquisition officer of each executive agency.

"(4) The Under Secretary of Defense for Acquisition, Technology, and Logistics.

"(5) Any other officer or employee of the United States designated by the Chairman.

"(c) LEADERSHIP; SUPPORT.—(1) The Administrator for Federal Procurement Policy shall lead the activities of the Council on behalf of the Deputy Director for Management.

"(2)(A) The Vice Chairman of the Council shall be selected by the Council from among its members.

"(B) The Vice Chairman shall serve a 1-year term, and may serve multiple terms.

"(3) The Administrator of General Services shall provide administrative and other support for the Council.

"(d) PRINCIPAL FORUM.—The Council is designated the principal interagency forum for monitoring and improving the Federal acquisition system.

"(e) FUNCTIONS.—The Council shall perform functions that include the following:

"(1) Develop recommendations for the Director of the Office of Management and Budget on Federal acquisition policies and requirements.

"(2) Share experiences, ideas, best practices, and innovative approaches related to Federal acquisition.

"(3) Assist the Administrator in the identification, development, and coordination of multiagency projects and other innovative initiatives to improve Federal acquisition.

"(4) Promote effective business practices that ensure the timely delivery of best value products to the Federal Government and achieve appropriate public policy objectives.

"(5) Further integrity, fairness, competition, openness, and efficiency in the Federal acquisition system.

"(6) Work with the Office of Personnel Management to assess and address the hiring, training, and professional development needs of the Federal Government related to acquisition.

"(7) Work with the Administrator and the Federal Acquisition Regulatory Council to promote the business practices referred to in paragraph (4) and other results of the functions carried out under this subsection.".

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of such Act is amended by inserting after the item relating to section 16 the following new item:

"Sec. 16A. Chief Acquisition Officers Council.".

SEC. 203. STATUTORY AND REGULATORY REVIEW.

(a) ESTABLISHMENT.—Not later than 90 days after the date of the enactment of this Act, the Administrator for Federal Procurement Policy shall establish an advisory panel to review laws and regulations that hinder the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of Governmentwide contracts.

(b) MEMBERSHIP.—The panel shall be composed of at least nine individuals who are recognized experts in acquisition law and Government acquisition policy. In making appointments to the panel, the Administrator shall—

(1) consult with the Secretary of Defense, the Administrator of General Services, the Committees on Armed Services and Government Reform of the House of Representatives, and the Committees on Armed Services and Governmental Affairs of the Senate, and

(2) ensure that the members of the panel reflect the diverse experiences in the public and private sectors.

(c) DUTIES.—The panel shall—

(1) review all Federal acquisition laws and regulations with a view toward ensuring increased use of commercial practices and performance-based contracting; and

(2) make any recommendations for the repeal or amendment of such laws or regulations that are considered necessary as a result of such review—

(A) to eliminate any provisions in such laws or regulations that are unnecessary for the effective, efficient, and fair award and adminis-

tration of contracts for the acquisition by the Federal Government of goods and services;

(B) to ensure the continuing financial and ethical integrity of acquisitions by the Federal Government; and

(C) to protect the best interests of the Federal Government.

(d) REPORT.—Not later than one year after the establishment of the panel, the panel shall submit to the Administrator and to the Committees on Armed Services and Government Reform of the House of Representatives and the Committees on Armed Services and Governmental Affairs of the Senate a report containing a detailed statement of the findings, conclusions, and recommendations of the panel.

Subtitle B—Other Acquisition Improvements

SEC. 211. ENSURING EFFICIENT PAYMENT.

(a) REVISION TO FAR.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation under sections 6 and 25 of the Office of Federal Procurement Policy Act shall be revised to provide the following:

(1) Authority to permit, to the maximum extent practicable, Federal contractors for services to sub-

mit to the Federal Government invoices for payment either—

(A) biweekly through electronic means; or

(B) monthly.

(2) A requirement that for any such invoice submitted through electronic means, the date of the invoice shall be the date a proper invoice is received by the Federal Government.

(3) A requirement that the Federal Government accept or reject such an invoice submitted through electronic means not later than 7 working days after the date of the invoice.

(4) A requirement that all accepted invoices be paid as soon as possible, but in no event later than 30 days after the date of the invoice.

(b) DEFINITIONS.—In this section:

(1) The term "payment" means an invoice payment as defined in section 32.001 of the Federal Acquisition Regulation (48 C.F.R. 32.001), as in effect on May 1, 2002.

(2) The term "proper invoice" has the meaning given that term in section 3901(a)(3) of title 31, United States Code.

SEC. 212. EXTENSION OF AUTHORITY TO CARRY OUT FRANCHISE FUND PROGRAMS.

Section 403(f) of the Federal Financial Management Act of 1994 (Public Law 103–356; 31 U.S.C. 501 note) is amended by striking "October 1, 2001" and inserting "October 1, 2006".

SEC. 213. AGENCY ACQUISITION PROTESTS.

(a) DEFENSE CONTRACTS.—(1) Chapter 137 of title 10, United States Code, is amended by inserting after section 2305a the following new section:

"§ 2305b. Protests

"(a) IN GENERAL.—An interested party may protest an acquisition of supplies or services by an agency based on an alleged violation of an acquisition law or regulation, and a decision regarding such alleged violation shall be made by the agency in accordance with this section.

"(b) RESTRICTION ON CONTRACT AWARD PENDING DECISION.—(1) Except as provided in paragraph (2), a contract may not be awarded by an agency after a protest concerning the acquisition has been submitted under this section and while the protest is pending.

"(2) The head of the acquisition activity responsible for the award of the contract may authorize the award of a contract, notwithstanding pending protest under this section, upon making a written finding that urgent and

compelling circumstances do not allow for waiting for a decision on the protest.

"(c) RESTRICTION ON CONTRACT PERFORMANCE PENDING DECISION.—(1) Except as provided in paragraph (2), performance of a contract may not be authorized (and performance of the contract shall cease if performance has already begun) in any case in which a protest of the contract award is submitted under this section before the later of—

"(A) the date that is 10 days after the date of contract award; or

"(B) the date that is five days after an agency debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required, under section 2305(b)(5) of this title.

"(2) The head of the acquisition activity responsible for the award of a contract may authorize performance of the contract notwithstanding a pending protest under this section upon making a written finding that urgent and compelling circumstances do not allow for waiting for a decision on the protest.

"(d) DEADLINE FOR DECISION.—The head of an agency shall issue a decision on a protest under this section not later than the date that is 20 working days after

the date on which the protest is submitted to such head of an agency.

"(e) CONSTRUCTION.—Nothing in this section shall affect the right of an interested party to file a protest with the Comptroller General under subchapter V of chapter 35 of title 31 or in the United States Court of Federal Claims.

"(f) DEFINITIONS.—In this section, the terms 'protest' and 'interested party' have the meanings given such terms in section 3551 of title 31.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2305a the following new item:

"2305b. Protests.".

(b) OTHER AGENCIES.—(1) Title III of the Federal Property and Administrative Services Act of 1949 is amended by inserting after section 303M (41 U.S.C. 253m) the following new section:

"SEC. 303N. PROTESTS.

"(a) IN GENERAL.—An interested party may protest an acquisition of supplies or services by an executive agency based on an alleged violation of an acquisition law or regulation, and a decision regarding such alleged violation shall be made by the agency in accordance with this section.

"(b) RESTRICTION ON CONTRACT AWARD PENDING DECISION.—(1) Except as provided in paragraph (2), a contract may not be awarded by an agency after a protest concerning the acquisition has been submitted under this section and while the protest is pending.

"(2) The head of the acquisition activity responsible for the award of a contract may authorize the award of the contract, notwithstanding a pending protest under this section, upon making a written finding that urgent and compelling circumstances do not allow for waiting for a decision on the protest.

"(c) RESTRICTION ON CONTRACT PERFORMANCE PENDING DECISION.—(1) Except as provided in paragraph (2), performance of a contract may not be authorized (and performance of the contract shall cease if performance has already begun) in any case in which a protest of the contract award is submitted under this section before the later of—

"(A) the date that is 10 days after the date of contract award; or

"(B) the date that is five days after an agency debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required, under section 303B(e) of this title.

"(2) The head of the acquisition activity responsible for the award of a contract may authorize performance of the contract notwithstanding a pending protest under this section upon making a written finding that urgent and compelling circumstances do not allow for waiting for a decision on the protest.

"(d) DEADLINE FOR DECISION.—The head of an executive agency shall issue a decision on a protest under this section not later than the date that is 20 working days after the date on which the protest is submitted to the executive agency.

"(e) CONSTRUCTION.—Nothing in this section shall affect the right of an interested party to file a protest with the Comptroller General under subchapter V of chapter 35 of title 31, United States Code, or in the United States Court of Federal Claims.

"(f) DEFINITIONS.—In this section, the terms 'protest' and 'interested party' have the meanings given such terms in section 3551 of title 31, United States Code.".

(2) The table of contents in section 1(b) of such Act is amended by inserting after the item relating to section 303M the following new item:

(c) CONFORMING AMENDMENT.—Section 3553(d)(4) of title 31, United States Code, is amended—

(1) in subparagraph (A), by striking "or" at the end;

(2) by striking the period at the end of subparagraph (B) and inserting "; or"; and

(3) by adding at the end the following new subparagraph:

"(C) in the case of a protest of the same matter regarding such contract that is submitted under section 2305b of title 10 or section 303N of the Federal Property and Administrative Services Act of 1949, the date that is 5 days after the date on which a decision on that protest is issued.".

SEC. 214. IMPROVEMENTS IN CONTRACTING FOR ARCHITECTURAL AND ENGINEERING SERVICES.

(a) CLARIFICATION OF DEFINITION OF SURVEYING AND MAPPING.—(1) Section 1102 of title 40, United States Code, is amended by adding at the end the following new paragraph:

"(4) SURVEYING AND MAPPING.—The term 'surveying and mapping' means services performed by professionals such as surveyors, photogrammetrists, hydrographers, geodesists, or cartographers in the collection, storage, retrieval, or dissemination of graphical or digital data to depict natural or manmade physical features, phenomena,

or boundaries of the earth and any information related to such data, including any such data that comprises a survey, map, chart, geographic information system, remotely sensed image or data, or an aerial photograph.''.

(2) The Federal Acquisition Regulation shall be revised to include the definition added by subsection (a) of this section.

(b) TITLE 10.—Section 2855(b) of title 10, United States Code, is amended—

(1) in paragraph (2), by striking "$85,000" and inserting "$300,000"; and

(2) by adding at the end the following new paragraph:

"(4) The selection and competition requirements described in subsection (a) shall apply to any contract for architectural and engineering services (including surveying and mapping services) that is entered into by the head of an agency (as such term is defined in section 2302 of this title).''.

(c) ARCHITECTURAL AND ENGINEERING SERVICES.—Architectural and engineering services (as defined in section 1102 of title 40, United States Code) shall not be offered under multiple-award schedule contracts entered into by the Administrator of General Services or

under Governmentwide task and delivery-order contracts entered into under sections 2304a and 2304b of title 10, United States Code, or sections 303H and 303I of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h and 253i) unless such services—

(1) are performed under the direct supervision of a professional engineer licensed in a State; and

(2) are awarded in accordance with the selection procedures set forth in chapter 11 of title 40, United States Code.

SEC. 215. AUTHORIZATION OF TELECOMMUTING FOR FEDERAL CONTRACTORS.

(a) AMENDMENT TO THE FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend the Federal Acquisition Regulation issued in accordance with sections 6 and 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 405 and 421) to permit telecommuting by employees of Federal Government contractors in the performance of contracts entered into with executive agencies.

(b) CONTENT OF AMENDMENT.—The regulation issued pursuant to subsection (a) shall, at a minimum, provide that solicitations for the acquisition of property

or services may not set forth any requirement or evaluation criteria that would—

(1) render an offeror ineligible to enter into a contract on the basis of the inclusion of a plan of the offeror to permit the offeror's employees to telecommute; or

(2) reduce the scoring of an offer on the basis of the inclusion in the offer of a plan of the offeror to permit the offeror's employees to telecommute, unless the contracting officer concerned first—

(A) determines that the requirements of the agency, including the security requirements of the agency, cannot be met if the telecommuting is permitted; and

(B) documents in writing the basis for that determination.

(c) GAO REPORT.—Not later than one year after the date on which the regulation required by subsection (a) is published in the Federal Register, the Comptroller General shall submit to Congress—

(1) an evaluation of—

(A) the conformance of the regulations with law; and

(B) the compliance by executive agencies with the regulations; and

(2) any recommendations that the Comptroller General considers appropriate.

(d) DEFINITION.—In this section, the term "executive agency" has the meaning given that term in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).

TITLE III—CONTRACT INCENTIVES

SEC. 301. SHARE-IN-SAVINGS INITIATIVES.

(a) DEFENSE CONTRACTS.—Section 2332 of title 10, United States Code, is amended to read as follows:

"§ 2332. Share-in-savings contracts

"(a) AUTHORITY TO ENTER INTO SHARE-IN-SAVINGS CONTRACTS.—(1) The head of an agency may enter into a share-in-savings contract in which the Government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor in savings achieved through contract performance.

"(2)(A) Except as provided in subparagraph (B), a share-in-savings contract shall be awarded for a period of not more than five years.

"(B) A share-in-savings contract may be awarded for a period greater than five years, but not more than 10

years, if the head of the agency determines in writing prior to award of the contract that—

"(i) the level of risk to be assumed and the investment to be undertaken by the contractor is likely to inhibit the government from obtaining the needed performance competitively at a fair and reasonable price if the contract is limited in duration to a period of five years or less; and

"(ii) the performance to be acquired is likely to continue for a period of time sufficient to generate reasonable benefit for the government.

"(3) Contracts awarded pursuant to the authority of this section shall, to the maximum extent practicable, be performance-based contracts that identify objective outcomes and contain performance standards that will be used to measure achievement and milestones that must be met before payment is made.

"(4) Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that governs the amount of payment a contractor is to receive under the contract. Before commencement of performance of such a contract, the chief acquisition officer of the agency shall determine in

writing that the terms of the provision are quantifiable and will likely yield value to the Government.

"(5)(A) The head of the agency may retain savings realized through the use of a share-in-savings contract under this section that are in excess of the total amount of savings paid to the contractor under the contract. Except as provided in subparagraph (B), savings shall be credited to the appropriation or fund against which charges were made to carry out the contract.

"(B) Amounts retained by the agency under this subsection shall—

"(i) without further appropriation, remain available until expended; and

"(ii) be applied first to fund any contingent liabilities associated with share-in-savings procurements that are not fully funded.

"(b) CANCELLATION AND TERMINATION.—(1) If funds are not made available for the continuation of a share-in-savings contract entered into under this section in a subsequent fiscal year, the contract shall be canceled or terminated. The costs of cancellation or termination may be paid out of—

"(A) appropriations available for the performance of the contract;

"(B) appropriations available for acquisition of the type of property or services procured under the contract, and not otherwise obligated; or

"(C) funds subsequently appropriated for payments of costs of cancellation or termination, subject to the limitations in paragraph (3).

"(2) The amount payable in the event of cancellation or termination of a share-in-savings contract shall be negotiated with the contractor at the time the contract is entered into.

"(3) The head of an agency may enter into share-in-savings contracts under this section in any given fiscal year even if funds are not made specifically available for the full costs of cancellation or termination of the contract if funds are available and sufficient to make payments with respect to the first fiscal year of the contract and the following conditions are met regarding the funding of cancellation and termination liability:

"(A) The amount of unfunded contingent liability for the contract does not exceed the lesser of—

"(i) 50 percent of the estimated costs of a cancellation or termination; or

"(ii) $10,000,000.

"(B) Unfunded contingent liability in excess of $5,000,000 has been approved by the Director of the

Office of Management and Budget or the Director's designee.

"(c) DEFINITIONS.—In this section:

"(1) The term 'contractor' means a private entity that enters into a contract with an agency.

"(2) The term 'savings' means—

"(A) monetary savings to an agency; or

"(B) savings in time or other benefits realized by the agency, including enhanced revenues.

"(3) The term 'share-in-savings contract' means a contract under which—

"(A) a contractor provides solutions for—

"(i) improving the agency's mission-related or administrative processes; or

"(ii) accelerating the achievement of agency missions; and

"(B) the head of the agency pays the contractor an amount equal to a portion of the savings derived by the agency from—

"(i) any improvements in mission-related or administrative processes that result from implementation of the solution; or

"(ii) acceleration of achievement of agency missions.".

(b) OTHER CONTRACTS.—Section 317 of the Federal Property and Administrative Services Act of 1949 is amended to read as follows:

"SEC. 317. SHARE-IN-SAVINGS CONTRACTS.

"(a) AUTHORITY TO ENTER INTO SHARE-IN-SAVINGS CONTRACTS.—(1) The head of an executive agency may enter into a share-in-savings contract in which the Government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor in savings achieved through contract performance.

"(2)(A) Except as provided in subparagraph (B), a share-in-savings contract shall be awarded for a period of not more than five years.

"(B) A share-in-savings contract may be awarded for a period greater than five years, but not more than 10 years, if the head of the agency determines in writing prior to award of the contract that—

"(i) the level of risk to be assumed and the investment to be undertaken by the contractor is likely to inhibit the government from obtaining the needed performance competitively at a fair and reasonable

price if the contract is limited in duration to a period of five years or less; and

"(ii) the performance to be acquired is likely to continue for a period of time sufficient to generate reasonable benefit for the government.

"(3) Contracts awarded pursuant to the authority of this section shall, to the maximum extent practicable, be performance-based contracts that identify objective outcomes and contain performance standards that will be used to measure achievement and milestones that must be met before payment is made.

"(4) Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that governs the amount of payment a contractor is to receive under the contract. Before commencement of performance of such a contract, the chief acquisition officer of the agency shall determine in writing that the terms of the provision are quantifiable and will likely yield value to the Government.

"(5)(A) The head of the agency may retain savings realized through the use of a share-in-savings contract under this section that are in excess of the total amount of savings paid to the contractor under the contract. Except as provided in subparagraph (B), savings shall be

credited to the appropriation or fund against which charges were made to carry out the contract.

"(B) Amounts retained by the agency under this subsection shall—

"(i) without further appropriation, remain available until expended; and

"(ii) be applied first to fund any contingent liabilities associated with share-in-savings procurements that are not fully funded.

"(b) CANCELLATION AND TERMINATION.—(1) If funds are not made available for the continuation of a share-in-savings contract entered into under this section in a subsequent fiscal year, the contract shall be canceled or terminated. The costs of cancellation or termination may be paid out of—

"(A) appropriations available for the performance of the contract;

"(B) appropriations available for acquisition of the type of property or services procured under the contract, and not otherwise obligated; or

"(C) funds subsequently appropriated for payments of costs of cancellation or termination, subject to the limitations in paragraph (3).

"(2) The amount payable in the event of cancellation or termination of a share-in-savings contract shall be ne-

gotiated with the contractor at the time the contract is entered into.

"(3) The head of an executive agency may enter into share-in-savings contracts under this section in any given fiscal year even if funds are not made specifically available for the full costs of cancellation or termination of the contract if funds are available and sufficient to make payments with respect to the first fiscal year of the contract and the following conditions are met regarding the funding of cancellation and termination liability:

"(A) The amount of unfunded contingent liability for the contract does not exceed the lesser of—

"(i) 50 percent of the estimated costs of a cancellation or termination; or

"(ii) $10,000,000.

"(B) Unfunded contingent liability in excess of $5,000,000 has been approved by the Director of the Office of Management and Budget or the Director's designee.

"(c) DEFINITIONS—In this section:

"(1) The term 'contractor' means a private entity that enters into a contract with an agency.

"(2) The term 'savings' means—

"(A) monetary savings to an agency; or

"(B) savings in time or other benefits realized by the agency, including enhanced revenues.

"(3) The term 'share-in-savings contract' means a contract under which—

"(A) a contractor provides solutions for—

"(i) improving the agency's mission-related or administrative processes; or

"(ii) accelerating the achievement of agency missions; and

"(B) the head of the agency pays the contractor an amount equal to a portion of the savings derived by the agency from—

"(i) any improvements in mission-related or administrative processes that result from implementation of the solution; or

"(ii) acceleration of achievement of agency missions.".

(c) DEVELOPMENT OF INCENTIVES.—The Director of the Office of Management and Budget shall—

(1) identify potential opportunities for the use of share-in-savings contracts;

(2) provide guidance to executive agencies for determining mutually beneficial savings share ratios

and baselines from which savings may be measured; and

(3) in consultation with the Committee on Governmental Affairs of the Senate, the Committee on Government Reform of the House of Representatives, and executive agencies, develop techniques to permit an executive agency to retain a portion of the savings (after payment of the contractor's share of the savings) derived from share-in-savings contracts as funds are appropriated to the agency in future fiscal years.

(d) REGULATIONS.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to implement the provisions enacted by this section. Such revisions shall—

(1) provide for the use of competitive procedures in the selection and award of share-in-savings contracts to—

(A) ensure the contractor's share of savings reflects the risk involved and market conditions; and

(B) otherwise yield best value to the government; and

(2) allow appropriate regulatory flexibility to facilitate the use of share-in-savings contracts by exec-

utive agencies, including the use of innovative provisions for technology refreshment and nonstandard Federal Acquisition Regulation contract clauses.

(e) OMB REPORT TO CONGRESS.—In consultation with executive agencies, the Director of the Office of Management and Budget shall, not later than 2 years after the completion of the revisions to the Federal Acquisition Regulation under subsection (d), submit to Congress a report containing—

(1) a description of the number of share-in-savings contracts entered into by each executive agency under by this section and the amendments made by this section, and, for each contract identified—

(A) the performance acquired;

(B) the total amount of payments made to the contractor; and

(C) the total amount of savings or other measurable benefits realized;

(2) a description of the ability of agencies to determine the baseline costs of a project against which savings can be measured; and

(3) any recommendations, as the Director deems appropriate, regarding additional changes in law that may be necessary to ensure effective use of share-in-savings contracts by executive agencies.

(f) DEFINITIONS.—In this section, the terms "contractor", "savings", and "share-in-savings contract" have the meanings given those terms in section 2332 of title 10, United States Code, and section 317 of the Federal Property and Administrative Services Act of 1949 (as amended by subsections (a) and (b)).

(g) REPEAL OF SUPERSEDED PROVISIONS.—Subsections (c), (d), (e), (f), (g), and (i) of section 210 of the E-Government Act of 2002 (Public Law 107–317; 116 Stat. 2936) are repealed.

SEC. 302. INCENTIVES FOR CONTRACT EFFICIENCY.

(a) INCENTIVES FOR CONTRACT EFFICIENCY.—The Office of Federal Procurement Policy Act (41 U.S.C. 403 et seq.) is amended by adding at the end the following new section:

"SEC. 41. INCENTIVES FOR EFFICIENT PERFORMANCE OF SERVICES CONTRACTS.

"(a) OPTIONS FOR SERVICES CONTRACTS.—The head of an executive agency may include in a contract for the performance of services an option to extend the contract by one or more additional periods on the basis of exceptional performance by the contractor. A contract that provides for such extensions shall include performance standards for measuring performance under the contract

and, to the maximum extent practicable, be performance-based.

"(b) DEFINITION OF PERFORMANCE-BASED.—In this section, the term 'performance-based', with respect to a contract, task order, or contracting, means that the contract, task order, or contracting, respectively, includes the use of performance work statements that set forth contract requirements in clear, specific, and objective terms with measurable outcomes.".

(b) CLERICAL AND TECHNICAL AMENDMENTS.—(1) The table of contents in section 1(b) of such Act is amended by striking the last item and inserting the following:

(2) The section before section 41 of such Act (as added by subsection (a)) is redesignated as section 40.

TITLE IV—ACQUISITIONS OF COMMERCIAL ITEMS

SEC. 401. ADDITIONAL INCENTIVE FOR USE OF PERFORMANCE-BASED CONTRACTING FOR SERVICES.

(a) OTHER CONTRACTS.—Section 41 of the Office of Federal Procurement Policy Act, as added by section 302, is amended—

(1) by redesignating subsection (b) as subsection (c); and

(2) by inserting after subsection (a) the following new subsection:

"(b) INCENTIVE FOR USE OF PERFORMANCE-BASED SERVICES CONTRACTS.—A performance-based contract for the procurement of services entered into by an executive agency or a performance-based task order for services issued by an executive agency may be treated as a contract for the procurement of commercial items if—

"(1) the contract or task order sets forth specifically each task to be performed and, for each task—

"(A) defines the task in measurable, mission-related terms; and

"(B) identifies the specific end products or output to be achieved; and

"(2) the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Federal Government.".

(c) CENTER OF EXCELLENCE IN SERVICE CONTRACTING.—Not later than 180 days after the date of the enactment of this Act, the Administrator for Federal Procurement Policy shall establish a center of excellence in contracting for services. The center of excellence shall assist the acquisition community by identifying, and serving

as a clearinghouse for, best practices in contracting for services in the public and private sectors.

(d) REPEAL OF SUPERSEDED PROVISION.—Subsection (b) of section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (as enacted into law by Public Law 106–398; 114 Stat. 1654A–218) is repealed.

SEC. 402. AUTHORIZATION OF ADDITIONAL COMMERCIAL CONTRACT TYPES.

Section 8002(d) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355; 108 Stat. 3387; 41 U.S.C. 264 note) is amended—

(1) in paragraph (1), by striking "and";

(2) by striking the period at the end of paragraph (2) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(3) authority for use of a time and materials contract or a labor-hour contract for the procurement of commercial services that are commonly sold to the general public through such contracts."

SEC. 403. CLARIFICATION OF COMMERCIAL SERVICES DEFINITION.

Section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)) is amended—

(1) in subparagraph (A), by striking ", other than real property," and inserting "(other than real property) or service";

(2) in subparagraph (C), by inserting "or service" after "item";

(3) in subparagraph (D), by striking "(C), or (E)" and inserting "or (C), or any combination of services meeting the requirements of subparagraphs (A) or (C),";

(4) by striking subparagraphs (E) and (F);

(5) by redesignating subparagraphs (G) and (H) as subparagraphs (E) and (F), respectively; and

(6) in subparagraph (E), as so redesignated, by striking "through (F)" and inserting "through (D)".

SEC. 404. DESIGNATION OF COMMERCIAL BUSINESS ENTITIES.

(a) IN GENERAL.—Section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403), as amended by section 403, is further amended—

(1) by adding at the end of paragraph (12) the following new subparagraph:

"(G) Items or services produced or provided by a commercial entity."; and

(2) by adding at the end the following new paragraph:

"(16) The term 'commercial entity' means any enterprise whose primary customers are other than the Federal Government. In order to qualify as a commercial entity, at least 90 percent (in dollars) of the sales of the enterprise over the past three business years must have been made to private sector entities.".

(b) COMPTROLLER GENERAL REVIEW.—The Comptroller General shall review the implementation of the amendments made by subsection (a) to evaluate the effectiveness of such implementation in increasing the availability of items and services to the Federal Government at fair and reasonable prices.

TITLE V—OTHER MATTERS

SEC. 501. AUTHORITY TO ENTER INTO CERTAIN PROCUREMENT-RELATED TRANSACTIONS AND TO CARRY OUT CERTAIN PROTOTYPE PROJECTS.

Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended by adding at the end the following new section:

"SEC. 318. AUTHORITY TO ENTER INTO CERTAIN TRANSACTIONS FOR DEFENSE AGAINST OR RECOVERY FROM TERRORISM OR NUCLEAR, BIOLOGICAL, CHEMICAL, OR RADIOLOGICAL ATTACK.

"(a) AUTHORITY.—

"(1) IN GENERAL.—The head of an executive agency who engages in basic research, applied research, advanced research, and development projects that—

"(A) are necessary to the responsibilities of such official's executive agency in the field of research and development, and

"(B) have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack,

may exercise the same authority (subject to the same restrictions and conditions) with respect to such research and projects as the Secretary of Defense may exercise under section 2371 of title 10, United States Code, except for subsections (b) and (f) of such section 2371.

"(2) PROTOTYPE PROJECTS.—The head of an executive agency may, under the authority of paragraph (1), carry out prototype projects that meet the

requirements of subparagraphs (A) and (B) of paragraph (1) in accordance with the requirements and conditions provided for carrying out prototype projects under section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160; 10 U.S.C. 2371 note). In applying the requirements and conditions of that section 845—

"(A) subsection (c) of that section shall apply with respect to prototype projects carried out under this paragraph; and

"(B) the Director of the Office of Management and Budget shall perform the functions of the Secretary of Defense under subsection (d) of that section.

"(3) APPLICABILITY TO SELECTED EXECUTIVE AGENCIES.—

"(A) OMB AUTHORIZATION REQUIRED.— The head of an executive agency may exercise authority under this subsection only if authorized by the Director of the Office of Management and Budget to do so.

"(B) RELATIONSHIP TO AUTHORITY OF DEPARTMENT OF HOMELAND SECURITY.—The authority under this subsection shall not apply to the Secretary of Homeland Security while

section 831 of the Homeland Security Act of 2002 (Public Law 107-296; 116 Stat. 2224) is in effect.

"(b) ANNUAL REPORT.—The annual report of the head of an executive agency that is required under subsection (h) of section 2371 of title 10, United States Code, as applied to the head of the executive agency by subsection (a), shall be submitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform of the House of Representatives.

"(c) REGULATIONS.—The Director of the Office of Management and Budget shall prescribe regulations to carry out this section.".

SEC. 502. AMENDMENTS RELATING TO FEDERAL EMERGENCY PROCUREMENT FLEXIBILITY.

(a) REPEAL OF SUNSET FOR AUTHORITIES APPLICABLE TO PROCUREMENTS FOR DEFENSE AGAINST OR RECOVERY FROM TERRORISM OR NUCLEAR, BIOLOGICAL, CHEMICAL, OR RADIOLOGICAL ATTACK.—Section 852 of the Homeland Security Act of 2002 (Public Law 107–296; 116 Stat. 2235) is amended by striking ", but only if a solicitation of offers for the procurement is issued during the 1-year period beginning on the date of the enactment of this Act".

(b) APPLICABILITY OF INCREASED SIMPLIFIED ACQUISITION THRESHOLD.—(1) The matter preceding paragraph (1) of section 853(a) of the Homeland Security Act of 2002 (Public Law 107–296; 116 Stat. 2235) is amended to read as follows:

"(a) THRESHOLD AMOUNTS.—For a procurement referred to in section 852, the simplified acquisition threshold referred to in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)) is deemed to be—".

(2) Subsections (b) and (c) of section 853 of such Act are repealed.

(3) The heading of section 853 of such Act is amended to read as follows:

"SEC. 853. INCREASED SIMPLIFIED ACQUISITION THRESHOLD FOR CERTAIN PROCUREMENTS.".

(4) The table of contents in section 1(b) of such Act is amended by striking the item relating to section 853 and inserting the following:

"Sec. 853. Increased simplified acquisition threshold for certain procurements.".

(5) Section 18(c)(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 416(c)(1)) is amended—

(A) by striking "or" at the end of subparagraph (G);

(B) by striking the period at the end of subparagraph (H) and inserting "; or"; and

(C) by adding at the end the following:

"(I) the procurement is by the head of an executive agency pursuant to the special procedures provided in section 853 of the Homeland Security Act of 2002 (Public Law 107–296).".

(c) APPLICABILITY OF CERTAIN COMMERCIAL ITEMS AUTHORITIES.—(1) Subsection (a) of section 855 of the Homeland Security Act of 2002 (Public Law 107–296; 116 Stat. 2236) is amended to read as follows:

"(a) AUTHORITY.— With respect to a procurement referred to in section 852, the head of an executive agency may deem any item or service to be a commercial item for the purpose of Federal procurement laws.".

(2) Subsection (b)(1) of section 855 of such Act is amended by striking "to which any of the provisions of law referred to in subsection (a) are applied".

(d) EXTENSION OF DEADLINE FOR REVIEW AND REPORT.—Section 857(a) of the Homeland Security Act of 2002 (Public Law 107–296; 116 Stat. 2237) is amended by striking "2004" and inserting "2006".

SEC. 503. AUTHORITY TO MAKE INFLATION ADJUSTMENTS TO SIMPLIFIED ACQUISITION THRESHOLD.

Section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)) is amended by inserting before the period at the end the following: ", except that

such amount may be adjusted by the Administrator every five years to the amount equal to $100,000 in constant fiscal year 2003 dollars (rounded to the nearest $10,000)".

SEC. 504. TECHNICAL CORRECTIONS RELATED TO DUPLICATIVE AMENDMENTS.

(a) REPEAL OF SUPERSEDED SUBCHAPTER AND RELATED CONFORMING AMENDMENTS.—(1) Subchapter II of chapter 35 of title 44, United States Code, is repealed.

(2) Subchapter III of such chapter is redesignated as subchapter II.

(3) Section 3549 of title 44, United States Code, is amended by striking the sentence beginning with "While this subchapter".

(4) The table of sections at the beginning of chapter 35 of title 44, United States Code, is amended—

(A) by striking the items relating to sections 3531 through 3538; and

(B) by striking the heading "SUBCHAPTER III".

(5) Section 2224a of title 10, United States Code, is repealed, and the table of sections at the beginning of chapter 131 of such title is amended by striking the item relating to such section.

(b) CONFORMING AMENDMENTS RELATED TO REPEALS OF SHARE-IN-SAVINGS AND SOLUTIONS-BASED CONTRACTING PILOT PROGRAMS.—(1) Chapter 115 of title 40, United States Code, is repealed.

(2) The table of chapters at the beginning of subtitle III of such title is amended by striking the item relating to chapter 115.

(c) AMENDMENTS MADE BY E-GOVERNMENT ACT MADE APPLICABLE.—The following provisions of law shall read as if the amendments made by title X of the Homeland Security Act of 2002 (Public Law 107–296) to such provisions did not take effect:

(1) Section 2224 of title 10, United States Code.

(2) Sections 20 and 21 of the National Institute of Standards and Technology Act (15 U.S.C. 278g-3 and 278g-4).

(3) Sections 11331 and 11332 of title 40, United States Code.

(4) Subtitle G of title X of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106–398; 44 U.S.C. 3531 note).

(5) Sections 3504(g), 3505, and 3506(g) of title 44, United States Code.

(d) CORRECTION OF CROSS REFERENCE.—Section 2224(c) of title 10, United States Code, as amended by section 301(c)(1)(B)(iii) of the E-Government Act of 2002 (Public Law 107–347; 116 Stat. 2955), is amended by striking "subchapter III" and inserting "subchapter II".

○

Chairman TOM DAVIS. We invited two other witnesses to today's hearing that were unable to attend: Ms Deidre Lee from the Department of Defense and Dr. Steve Kelman from Harvard School of Government. Ms. Lee couldn't appear because of a death in her family, and Dr. Kelman has pressing classroom obligations that prevented him from appearing. Both have submitted statements for the record which are available at the press table.

[The prepared statements of Ms. Lee and Mr. Kelman follow:]

STATEMENT OF

DEIDRE A. LEE

DIRECTOR, DEFENSE PROCUREMENT & ACQUISITION POLICY

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION,

TECHNOLOGY & LOGISTICS

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

April 30, 2003

STATEMENT OF THE DIRECTOR, DEFENSE PROCUREMENT AND ACQUISITION POLICY

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY AND LOGISTICS

BEFORE THE U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON GOVERNMENT REFORM

April 30, 2003

Chairman Davis, Congressman Waxman and Members of the Committee:

I appreciate the opportunity to come before you today to discuss the proposed Services Acquisition Reform Act of 2003 (SARA) and your ideas for improving the acquisition of services within DoD.

In my testimony before you in March 2002 Mr. Chairman, I stated that our business environment within the Department of Defense remains very complex, particularly in the acquisition of services. The same is still true today. The amount of money the Department spends on services has increased significantly over the past decade, to the point where we now spend approximately an equal amount of money for the acquisition of services as we do for equipment. Because of this shift, we continue to increase our focus on how we acquire services and continue to develop new and strategic approaches to acquiring them.

We fully support the efforts of the Committee in a number of areas related to how the Department acquires goods and services. As SARA has not been reintroduced yet, my testimony is largely based on the prior version of SARA introduced in the last session.

The Department appreciates the Committee exempting our participation from the proposed Acquisition Workforce Training Fund. By centralizing the funding for training within the Department of Defense, we have demonstrated a commitment to and provided stability to training our acquisition workforce. The Defense Acquisition University (DAU) has a very robust training program. To ensure that we have a trained and highly qualified acquisition workforce to meet our changing missions, we are transforming DAU.

We are moving from purely classroom training to more web-based learning modules and we are no longer solely teaching the use of the Federal Acquisition Regulations. DAU is now also emphasizing critical thinking skills and business case reasoning to equip our workforce with the right skills, tools and knowledge to operate in a more business-like manner. The Department looks forward to working with the civilian agencies and the Federal Acquisition Institute in developing a comprehensive training program that ensures the acquisition workforce acquires the right skills and capabilities to be able to contribute effectively in the changing acquisition environment.

The Department supports specific provisions of the proposed legislation pertaining to the adaptation of business acquisition practices. We support the concepts contained in Sections 201 and 202 for the appointment of a Chief Acquisition Officer for each agency and the establishment of a Chief Acquisition Officer's Council and appreciate the Committee exempting DoD from these provisions as we currently have such a position, namely the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)). The Department has no objection to the proposed Section 205 to review the laws and regulations that hinder the use of commercial practices and performance-based contracting. We embrace continuing efforts to improve our acquisition processes and to remove barriers that prevent us from making the best possible business decision.

To continue, we support certain revisions to share-in-savings initiatives. The share-in-savings authority, as defined by the Clinger-Cohen Act and the E-Government Act of 2002, has not been fully implemented by the Department for a number of reasons. A primary concern within the DoD has been to ensure that funds spent for payment of savings are the right type of funds. Additionally, there may have been some reluctance by contractors to providing all of the non-recurring funds for the investment even with the long-term payback. We need a policy for using share-in-savings contracts that not only encourages our contractors to undertake aggressive cost reduction programs but one that also stimulates agency interest by allowing them to retain a portion of the savings after contractor payment.

Finally, the Department fully supports extending the procurement authorities granted by the Homeland Security Act and the Temporary Emergency Procurement Authority granted in the National Defense Authorization Act for Fiscal Year 2002. These authorities enable the Department to use these bold opportunities to achieve significant results for our customers. The situations that necessitated these authorities are still with us today and will remain so for the foreseeable future. Providing continued access to these authorities is needed as long as they are tied to specific objectives such as combating terrorism or other emergencies.

With regard to increasing our focus on how we acquire services and developing strategic approaches to acquiring them, we are conducting an analysis of how we acquire services. This analysis, known as a "spend" analysis, will encompass several issues including reviewing what type of services we acquire, who we acquire them from, and who does the acquiring. To support this effort, we are in the process of awarding a contract to conduct a commercial type "spend analysis" to assist us in the development of more global, strategic acquisition plans. The goal of this analysis is to provide the Department with baseline procurement information packaged in a format to facilitate the development of new, more effective and cost efficient acquisition plans. While we are seeking to leverage our buying power across the Department, we will also emphasize supporting small business initiatives, which will be addressed in the strategic acquisition plans.

In addition, to increase our focus on the acquisition of services, the USD(AT&L) issued a memorandum on May 31, 2002 to all of the military components. This implemented the requirements of Section 801 of the National Defense Authorization Act for Fiscal Year 2002 to develop and institutionalize a process for the management and oversight of the acquisition of services. The USD(AT&L) recently approved each of the three military departments' Management and Oversight of Acquisition of Services processes. My staff has also been working with representatives from the General Accounting Office, who are currently auditing our compliance with the provisions of Section 801.

In closing, I would like to affirm my commitment to achieving excellence in the acquisition of services within DoD. The Department is frequently hampered by a demanding set of statutory requirements, which restricts our flexibility, and thus our ability to adapt to changing circumstances. I look forward to working with you on your proposals to improve the acquisition of services within the Department.

Thank you for the opportunity to appear here today. I will be happy to address any questions you may have.

TESTIMONY OF DR. STEVEN KELMAN, ALBERT J. WEATHERHEAD II AND RICHARD W. WEATHERHEAD PROFESSOR OF PUBLIC MANAGEMENT, HARVARD UNIVERSITY, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, BEFORE THE COMMITTEE ON GOVERNMENT REFORM, ON THE SERVICES ACQUISITION REFORM ACT, APRIL 30, 2003

I appreciate the opportunity to express my support for the Services Acquisition Reform Act. I am a professor of public management at Harvard University and have devoted my professional career to improving government management in the interest of taxpayers and to training young people considering careers in public service. During the Clinton Administration, I served for four years as Administrator of the Office of Federal Procurement Policy.

This bill continues the effort to create a modern, businesslike procurement system that began a decade ago, in an exercise in bipartisanship and good government that is all-too-rare these days. Reform has not been uncontroversial – changing the hidebound practices of the past never is. But moderates, both Democrats and Republicans, have been able to work together and fend off opposition from further to the Left and further to the Right. I hope we will be able to continue down that constructive path.

The procurement system today is clearly in better shape than it was before reform began. Procurement is not only faster. It is, above all, better. As James Nagle writes regarding the overall state of the procurement system in the new edition of his History of

Government Contracting, published by the George Washington University Government Contracts Program: "The situation is as healthy as any I can recall in the history of peacetime government contracting. That is not to say it is idyllic. Protests and lawsuits still abound. Government contracts still dwarf their non-government counterparts in size, minutia, and risks. Contracting officers trained in the old system still refuse to change and many contractors still try to cheat. But, all in all, the 1990s have improved the process."

We have seen this dramatically since September 11. A dramatic military success story there is the central role played by the Joint Direct Attack Munition (JDAM), the military's "smart" bomb kit, in both Afghanistan and Iraq. JDAM, as has been widely noted in the media, is both better and much cheaper than the earlier generation of smart bombs it replaced.

JDAM is a poster child for procurement reform. The program had already been bid out prior to procurement reform when got reclassified as a reform pilot. The 87 military specifications were replaced by five performance standards. Two contractors did a development competition before the winner was selected, and DoD personnel were assigned to each contractor team to give "their" team the best advice they could to help that team win. Past performance was central to the source selection decision. The unit price of the JDAM went down by 50% -- which is why the military can afford so many of them.

We also saw the results of smart contracting decisions made during the mid-1990's by the Defense Logistics Agency, which buys food, clothing, and pharmaceuticals for our troops. During the mid-1990's DLA replaced one-off contracts with longer term

supply contracts that included surge requirements clauses, establishing obligations by suppliers to provide additional quantities of needed items during wartime. As a result, DLA has neither had to maintain wasteful inventory levels nor do emergency contracting, with limitations on competition, during wartime.

Procurement reform has been based on a simple principle – trying insofar as possible to make the government's procurement system resemble the way a world-class commercial firm would buy products and services from outside suppliers for itself. To accomplish this, Congress and the executive branch, working together, have sought to reduce bureaucracy and the fixation on process – and instead focus the system on achieving the best value for the government. We must never return to the days where our procurement officials believe, as they so often did in the past, that once they have followed the rules, their job is done.

This has been a bipartisan effort. But I'd like for a moment to speak as a Democrat and to explain why a Democratic administration initiated procurement reform and why Democrats should be supporting SARA. As Democrats, we believe that important public purposes can be accomplished through government. For government to accomplish these purposes, it must be efficient and effective – it must deliver results. Procurement reform has been an effort to apply modern management principles to government, in the service of achieving better results.

Before commenting on individual provisions of the bill I wish to note, in the interests of full disclosure, that I have done consulting work with Accenture, the information technology firm, on share-in-savings contracting and more generally on their

strategy in the government marketplace. This testimony has not been discussed with Accenture.

SARA includes a number of measured and targeted steps in the continued march of procurement reform. I would like to concentrate my testimony on two of what I regard as the most important features of the bill – the efforts to encourage share-in-savings contracting and the acquisition workforce improvements.

One of our highest priorities in contracting needs to be to expand the range of incentives available to the government to encourage good contractor performance, and to expand the use of incentives that are available. We've made a great start by expanding the use of past performance in awarding new contracts. In this spirit, I enthusiastically endorse the provisions in Section 301 to encourage share-in-savings contracting. "Share-in-savings" is a contract form whereby a contractor is paid, all or in part, based on the savings the contractor's effort generates for the government. In its most dramatic form – 100% share-in-savings – a contractor is paid nothing if its efforts fail to produce benefits for the government.

Share in savings contracting is the most exciting innovation in contracting I have seen in years. The fact is that too many government information technology services procurements fail. The government spends taxpayer dollars and gets little or no return. Share in savings provides the most powerful incentive imaginable for the contractor to deliver results to the government – the more you save the government, the more you get paid. While IRS has been laboring for over a decade with a tax modernization effort, the State of California, with a tax system larger than that of many nations, successfully modernized its tax system in a few years using share-in-savings contracting. The

principle has also been applied in government to debt collection, energy conservation, and recovery auditing.

In federal IT, the Department of Education, which runs the college student loan program, took the lead in pioneering a share-in-savings approach for their systems modernization program. Although this program has unfortunately fallen victim to partisan politics of a very unfortunate sort, the program, while it allowed to operate, showed real successes in delivering results fast and delivering savings.

Agencies already have share-in-savings authority based on the multi-year contracting provisions in FAR Part 17. Section 301 allows an expanded ability to enter into share-in-savings contracts without full upfront funding of any cancellation charges for the contract, as current multi-year contracting authority requires. This provision does raise some question marks from an appropriations policy perspective. At the same time, I fear that until federal agencies have obtained sufficient experience using share-in-savings, they will be hesitant to undertake them if they are required to fund all potential cancellation charges upfront. And statutory precedent exists in the Energy Policy Act for waiving the requirement to fund cancellation charges upfront for energy savings contracts. I would suggest that this provision have a statutory life of ten years, so we can see the effects of expanding the ability to do share-in-savings contracting without such full upfront funding. With that experience, Congress can then decide how it wishes to deal with the upfront funding issue.

Additionally, I would urge that SARA address the question of whether costs to cover a termination for convenience (other than for a termination for convenience due to non-availability of funds) need be included in any upfront funding of termination

liabilities. Right now, this is, I think, somewhat unclear. Agencies are not required to fund contingent termination for convenience liabilities upfront on single-year contracts. It is unclear to me whether there is any general practice in the agencies regarding the need to include funding for termination for convenience liabilities (for reasons other than non-availability of funds) in the termination liabilities that need to be funded upfront in a multi-year contract. I would urge that the statute make clear that the only termination liabilities that need to be funded upfront for share-in-savings contracts are liabilities in the event of non-availability of funds, not those growing from other sources of termination for convenience.

As a general matter, there is no greater disincentive to agency cost-saving efforts that the current practice of OMB and congressional appropriators to punish an agency for achieving savings by reducing the agency's appropriation in the area where savings were achieved on a dollar-for-dollar basis. Career government people constantly express frustration with this self-defeating policy. There is no general statutory fix, I don't believe, for the problem; fixes, if any, must occur on a situation-by-situation basis. But I am very pleased that Section 301 recognizes this as a problem and encourages efforts to come up with ways to deal with it. This is a problem for government beyond just share-in-savings contracting, but this is a good place to start.

I also endorse the provision in Section 302 to recognize "award term" contracting. This is a procurement innovation that originated with our career contracting workforce at the Air Force and NASA. It should definitely be recognized as part of our contracting incentive toolkit. With this technique already spreading and no questions about legality (to my knowledge) having been raised, perhaps no statutory authorization is required.

But I like the idea of honoring the dedicated professionals who developed this idea by having it recognized in statute.

Finally with regard to incentives, I would like to urge that provisions be added to the contract incentive section of the bill regarding time and materials contracts. This form of contract has grown significantly over recent years. Compared to cost-reimbursement contracting, it has a number of advantages, mainly involving the ability (in my view, only in cases where the contract is awarded competitively) to avoid recource to certified cost and pricing data, cost accounting standards, and the cost principles, which provides greater potential access to commercial companies. However, a traditionally recognized problem with T&M contracts is that they provide even less incentive for cost-control – in terms of the number of hours worked to do a job – than do cost-reimbursement contracts, since contractor profit is included in T&M rates and therefore the profit is higher, the larger the number of hours billed. And, of course, T&M contracts typically are not performance-based, which, as the bill notes in other provisions, is the preferred form of services contracting where possible.

To provide incentives for cost control, I would urge the addition of language directing the Federal Acquisition Regulation to note that fixed-price incentive fee contracts may be used for T&M/labor hour work and stating a preference for such incentive arrangements when T&M/labor hour contracting is used. I do not believe that it would now be unlawful to use a fixed-price incentive fee contract in these circumstances, but, unfortunately, some contracting officials still believe, despite language in Part One of the FAR, that contract types not specifically authorized are illegal. I also believe that, when (although only when) paired with fixed-price incentive fee contracts, we should

also authorize in statute T&M award fee contracts as well, to incentivize good performance.

Second, I strongly endorse the provisions in Section 102 to establish an acquisition workforce training fund, and the other provisions in Sections 103 through 105 to strengthen the quality of our acquisition workforce. The reforms of the past decade place new demands on our contracting workforce, to be, in the words of Deidre Lee, Director of Defense Procurement, business advisors and not just regulation-box checkers. And, in the IT arena, the government has an enormous need to increase its skills in program management, performance management of contractors, and contract administration. For many agencies, acquisition needs to become an agency core competency, and we're far from being at a place where it is. The proposed fund, and the other provisions in Sections 103 through 105, could make a big difference in this regard.

I do not agree with the view that the training fund is somehow "poor budgeting policy." The funds currently being paid for GWAC/GSA schedule administrative fees are appropriated funds that are being used to pay administrative costs of operating the procurement process. Part of these administrative costs, in my view, should be seen as being the proper training of our acquisition workforce. In fact, many budgeting experts would argue that it is over-specification of micro-categories in budgets, of the kind some critics of this training fund appear to advocate, that is bad budgeting policy.

My concern with Section 102 as written is a somewhat different one. I fear that, absent special provisions, the monies made available through this training fund will substitute for existing agency efforts, rather than adding to them as is needed and as is, I believe, the intention of the drafters of SARA. I believe that Section 102 should specify

that these funds may not be used to meet existing statutory training or education requirements for the acquisition workforce. Instead, I would suggest that every several years, the Chief Acquisition Officers Council be directed to select some small number of high-priority training areas for which these funds may be used.

I also endorse the proposals to establish an exchange program for the acquisition workforce and to permit designation of acquisition employees as "critical shortage" employees. Section 104 will give people in the private sector who wish to undertake a period of public service a chance to do so, while giving government employees an opportunity to learn about industry practices. My hope would be that most of the employees participating in such a program would not come from or go to traditional "government contractors," but that the exchange involve firms doing little government business or the non-government divisions of firms doing significant government business. This will increase the opportunity for public service and increase the learning opportunities for government employees, while reducing conflict of interest concerns. I also approve efforts, such as the critical shortage designation, to reduce the bureaucracy involved in hiring young people into the acquisition workforce.

Section 106: Recruitment and Retention Pilot Program

I endorse this provision, which is another part of a strategy for dealing with the government's human capital crisis in acquisition. We can't afford to let outmoded bureaucratic personnel rules hinder the government's ability to compete for highly qualified potential employees.

I believe that the language regarding "preference eligibles" in this section is more restrictive than existing language in other "shortage category" fields and that, if this is correct, should be conformed to other hiring authorities for shortage areas.

Section 201: Chief Acquisition Officer

I endorse this provision, which is consistent with the view that acquisition is increasingly becoming a core competency for government. Having only seen a section-by-section analysis of the bill and not the actual bill language, I would add that the language describing the role of the Chief Acquisition Officer in last year's version of the bill emphasized a process and compliance-oriented role for the Chief Acquisition Officer, in phrases reminiscent of the old bureaucratic procurement system from which we have moved. There was in last year's version only one passing reference in this list of duties to the fundamental role of acquisition in promoting the agency mission, and the phrase was lost amidst a sea of procedurally oriented verbiage.

Section 212: Franchise Funds

I support this provision. It makes sense to allow government entities to achieve economies of scale by providing service for other government organizations. Franchise funds have introduced a healthy spirit of innovation and entrepreneurship into government organizations, which benefits agencies as a whole, and not just franchise fund operations.

Section 213: Acquisition Protests

Tremendous progress has been made over the last decade in reducing the prevalence of destructive procurement litigation, which promotes excessive risk-aversion on the part of government officials and creates a lose-lose adversarial environment

between government customers and suppliers. One element of this welcome development has been the increased ability to use agency protests as an alternative to more formalized protests in front of GAO or the Court of Federal Claims.

The point has been made over the years that contractors would be more likely to use informal agency protests if they could be assured of a stay of contract performance during the pendancy of an agency protest (which would be a maximum of 10 days). This is a sensible provision. Agency protests balance the interest in a procurement system that functions with integrity with a minimization of disruption and excessive litigiousness.

Section 401: Preference for Performance Based Contracting

I applaud the support for performance-based service contracting that this section provides. This was a procurement policy priority for the last two administrations, and it continues to be a priority for the current Administration.

I support the incentives the bill provides for using performance-based contracting. I would make several suggestions. At (b) (B) (ii) of last year's bill (again, I have only seen a section-by-section analysis of this year's bill), after noting that a performance-based contract or task order must define tasks "in measurable, mission-related terms," it was stated only that the contract or task order "identifies the specific end products or outputs to be achieved." There was no requirement that such end products or outputs themselves be specified in such measurable, mission-related terms – in principle, this language would allow definition of the end result sought in mission-oriented terms but require that the contractor produce only an output consisting of a level of effort or some input-related deliverable. To remedy this problem, I would suggest that (B) (ii) from last

year's bill be changed to read: "identifies the specific standards of performance required to meet the task as defined in (i)."

I support a Center of Excellence in Service Contracting. However, I would urge that this Center be placed in the Department of Defense, with appropriate procedures for collaboration with OFPP and with civilian agencies, and with its products available for use in the entire government. DoD is likely to have far more resources available for such a Center than would ever be granted to OFPP. I would hope that the Defense Department could play a role in this area similar to the one they played developing the discipline of project management in the 1950's. I would also add language making clear that the mission of these centers is to work on improvements in contract management for services.

Section 402: Authorization of Additional Commercial Contract Types

It is, of course, factually correct to state that there are many widely available services sold in the commercial world that are sold on a time and materials basis. I myself have purchased legal, repair, gardening, and housecleaning services in this manner.

Second, the kind of pricing regime imposed in the context of the Truth in Negotiations Act, which is essentially a regulated utility model of cost plus some standard percentage profit, is inappropriate to the way that firms in the commercial marketplace compete among themselves for customers. In services, two firms may have basically the same input costs, but one may put these input costs together in a way that creates more value for the customer, through creating a performance-oriented culture, through the quality of training and supervision, or through the way the firm manages

knowledge dissemination and sharing. In the marketplace, these two firms, with the same costs, will charge different prices, based on their quality and reliability, and will earn different rates of profit. This is perfectly legitimate – indeed, this is how competition in the service sector works. This shouldn't be prohibited through a one-size-fits-all utility regulation pricing model.

Third, requirements for submission of certified cost and pricing data, CAS compliance, and compliance with government cost principles deters commercial services firms not currently selling to the government from entering the government marketplace, which may deprive the government of cutting-edge firms, particularly small businesses. I have personally had discussions with individuals introducing commercial firms into the government marketplace for the first time where those individuals indicate that the firms they represent would only be willing to undertake fixed price or time and materials contracts, not cost-reimbursement contracts.

Fourth, over and above exemption from these cost-disclosure and audit-related requirements, there are other advantages of Part 12 acquisitions, such as freedom from a significant number of government-unique contract clauses that are a deterrent to the entry of commercial firms into the government marketplace, along with simplified procedures the government may use in acquiring commercial items.

For all these reasons, we should aim towards a situation where time and materials or labor-hour type contracts, for services widely available in the commercial marketplace, be classified as commercial items.

There is an important caveat, however: the time and materials contract (or task order) must be awarded competitively. As I indicated earlier, we should not expect that

all service providers have the same prices, or the same profit rates, because they are likely to be competing on their ability to take similar inputs and combine them into a higher-value service. But in a non-competitive situation, a service provider may still charge too much for a given level of quality. In a competitive environment, the customer has several combinations of price and quality from among which to choose, and is thus in a better position to make the appropriate tradeoffs. And vendors have an incentive to sharpen their pencils so they don't overcharge for the level of quality they provide. Finally, awarding contracts or task orders for commercial services competitively should not be difficult – since by definition such services are widely available in the marketplace.

Under current law, the government is precluded from obtaining certified cost data, or applying the cost accounting standards, for any commercial item, even when such items are acquired on a sole-source basis. An important justification for this provision of current law, I would assume, is that with regard to products, firms often compete on the basis of providing some unique feature or technology, which in turn can on occasion require a sole-source award to a commercial firm that would not sell to the government otherwise. As suggested above, this is not the case for commercial services. Firms don't compete based on offering something unique, but rather on offering different mixes of price and quality. Non-competitive awards for commercial services should, except perhaps in cases of time urgency (an exemption to competition under the Competition in Contracting Act), be made competitively.

There is a second issue with regard to applying current statutory language on commercial items to time and materials/labor hour contracts. Current statute forbids the

government from conducting audits of any sort, including post-award, for commercial items. This makes sense in a fixed-price commercial item environment. However, for commercial services contracts, the government should certainly have the right to conduct post-award incurred-cost type audits, to see if labor and materials provided were as billed for.

Therefore, I would support the language in Section 402 with two amendments. The first would be that, for a contract, order under the GSA schedules, or task order under a multiple-award task order contract, in order for work to be classified as a commercial service, the contract must meet the "adequate price competition" test in statute (with the hourly labor rates being considered a "price") and that for orders or task orders, at least two proposals for the specific work in question have been received by the government. The second would be that, for commercial services purchased using T&M or labor hours contracts, incurred-cost type audits (that labor and/or materials billed for were provided as billed) be permitted.

Section 404: Designation of Commercial Business Entities

Attracting predominantly commercial firms to do business with the government has been a central theme of the procurement reform efforts of the past decade. Through changes in policies and definitions regarding commercial items in FASA and Clinger-Cohen, we've made great progress in that regard. However, an ongoing theme throughout these discussions– a theme that was actually raised in the Report of the Section 800 Panel in 1993 at the beginning of procurement reform efforts -- has been to increase the ability of the government to attract predominantly commercial firms – that is to say, firms that don't primarily deal with the government – to do non-commercial work

for the government, such as defense R&D or production of defense items off of commercial production lines. The basic idea is that many firms may have research capabilities and/or technology that the government needs, but that these firms, which do not deal with the government, are unwilling to begin to do so because of large costs they would need to incur to meet government audit requirements, and the legal/public relations exposure that falling under such audit requirements would create. This deprives the government, in this view, of access to an important part of this country's knowledge and technology base. This is a particular problem in the post-September 11 environment, which makes addressing this issue more urgent and also expands its scope beyond the Defense Department to include homeland security products and services that civilian agencies might want to procure.

The language in this section seeks to encourage such commercial entities to do business with the government by applying the same legal regime used for commercial items to commercial entities, even if they are not selling commercial items.

I support the direction in which this language moves us. I am pleased by the removal of a provision in last year's bill, which allowed, in the percentage test for designating a commercial entity, including items sold to the government under FAR Part 12 (i.e. commercial items). This departed from the original justification for the creation of a category of commercial entities in the first place – to attract firms into the government marketplace that are not doing business with the government at all. Firms selling under Part 12 are already selling to the government. I was concerned that, as written, existing government contractors, perhaps even firms most or even all of whose work is for the government, would take various measures to get the percentage of their

company's commercial and FAR Part 12 work up to the percentage test, including by acquiring other firms, and then be exempted from audit/disclosure requirements designed for traditional defense contracts on existing defense production, so that the government lost even the possibility for various audit/disclosure rights when it buys tanks or warships from existing defense contractors under cost-based pricing arrangements. This would have been contrary to the spirit behind the effort to create special provisions for commercial entities. I am also pleased by the increase of the threshold to 90% and by the three-year requirement.

I believe the provision in the section-by-section analysis is a basically sound approach. I think that the possible provision, which I have heard discussed, involving individual contracts up to $200 million, probably has merit as well. I do think we need to learn more about the impact of changes in this area before proceeding aggressively. How many commercial firms would want to do contract R&D for the government, or produce non-commercial items on commercial production lines, even if none of these barriers existed? Do the problems these firms currently face arise only if the products or services in question are being bought on a sole-source basis, or do they arise even with competitive procurements? If the former, what kinds of contract types, or other ways to protect the government's interests, are appropriate in the case of sole-source contracts for non-commercial products or services?

I would make several suggestions. First, because there is some uncertainty about the effect of such a change on the government's access to commercial firms and to the government's ability to obtain fair and reasonable prices, and also in order to increase the attractiveness of the government marketplace to small businesses, I would suggest that

the percentage test for becoming designated as a commercial entity be somewhat more limited than in the bill – I would suggest that for a large business to be so designated, 95% of its sales would need to be non-governmental, while making the percentage for small businesses 85%. Second, many earlier discussions of this issue have referred to commercial divisions of firms, that is, the part or parts of a multi-divisional firm, other parts of which might be government contractors, that did not deal with the government. I would urge that consideration be given to restoring the division as a useful unit here – perhaps by allowing the bill's provisions to apply to individual divisions that do less than 3% of their work for the government Finally, I would consider making this a five-year test program.

Finally, a technical suggestion on this section: I suggest that the percentage test be limited to United States sales of a company. There is such variation, in terms of foreign governmental procurement practices, about the kinds of adaptations a company needs to make in terms of auditing/legal exposure that it doesn't seem to make sense to include the percentage of a firm's non-U.S. sales to foreign governments in calculating whether it is a commercial entity.

Section 503: Simplified Acquisition Threshold Inflation Adjustment

I support this provision. Original congressional intent in establishing a simplified acquisition threshold, based on price levels obtaining at the time of the original legislation, should not be hollowed out simply because of inflation.

Chairman TOM DAVIS. I will now recognize the distinguished ranking member, Mr. Waxman, for his comments, and thank him for the way we are engaging on this and in issues in the previous Congress that led us to some of our legislative victories. Mr. Waxman.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

Today we are going to hear testimony about the Service Acquisition Reform Act [SARA]. This legislation was introduced just yesterday. The issues addressed by this legislation are complex, and they affect billions of dollars in Federal spending. They deserve a thorough and detailed examination.

Mr. Chairman, you have stated that this legislation is needed to, "streamline," the procurement process. I support streamlining efforts, but efforts at streamlining must be weighed against competing goals of protecting against waste, fraud, and abuse. We need to review each provision of this legislation to ensure balance.

The Federal Government is the largest purchaser of goods and services in the world, spending over $200 billion annually on everything from fighter jets to paper clips to janitorial services. In recent years, there has been an especially rapid growth in the procurement of services. Contracting for services, which is a major subject of the legislation we are considering, now accounts for 43 percent of total contracting. Each year the Government spends a staggering $87 billion on service contracts, a larger amount than on any other category of contracts.

There are two keys that protect the taxpayer from waste, fraud, and abuse in service contracts: the Truth in Negotiations Act [TINA], and the cost accounting standards. These provisions ensure that the Government is not overcharged on Federal contracts. TINA applies when the Government enters a sole-source contract over $550,000. It requires the contractor to submit to the Federal Government cost and pricing data that justifies the reasonableness of the price being charged. The idea is that this cost and pricing data serves as a substitute for competition.

The cost accounting standards apply to cost-based contracts above certain thresholds, generally, $7.5 to $15 million. Cost accounting standards require that contractors consistently and accurately account for their costs. These standards are essential for ensuring that the Federal taxpayer is not overcharged for costs such as overhead or executive pensions.

Chairman Davis believes that these accounting standards can sometimes be too burdensome. In particular, he is concerned that many smaller companies and startup companies refuse to do business with the Federal Government because of the burdens of complying with these standards. Thus, many of the provisions in the bill waive the application of TINA and cost accounting standards to service contracts by deeming these contracts to be commercial items.

Under existing law, TINA and cost accounting standards do not apply to contracts for commercial items, on the theory that market forces keep prices down for commercial items. Now the chairman may have a point. We do need to ensure that smaller companies and other companies that don't normally do business with the Federal Government are able to do so, but we must do so in a way that

protects the taxpayers against waste, fraud, and abuse. We need to retain that balance.

My concern is that the bill before us goes too far. Halliburton just received a sole-source, cost-based contract to put out oil fires in Iraq and perform other oil field construction. The contract is potentially worth up to $7 billion. I don't think anyone here would believe that Halliburton should be excused from complying with the cost accounting standards, especially given the company's track record of overcharging the Government.

Yet, as I read this bill, the Halliburton contract could be considered a, "commercial service" contract that is exempt from these accountability standards. None of us wants to see a return to the days of $600 toilet seats. Yet, some of these provisions could lead to $600 contracts to repair broken toilets.

These are far from academic concerns. For years, GAO, the Inspector General, and private sector watchdogs have pointed to contract management at Federal agencies as an area of high risk for waste, fraud, and abuse. The Department of Energy and NASA spend more than 90 percent of their budgets on contracts with the private sector. Yet, they are consistently cited by GAO as examples of poor contract management.

DOD spends over $100 billion a year on contracts. Yet, it, too, is cited by GAO. Billions are lost through cost escalation and failed projects. Given this record, we should be strengthening the Government's tools to ensure accountability, not weakening them.

I am also concerned about other provisions in the SARA legislation such as a provision that allows employees from private contractors to take over the management of Federal procurement decisions. In essence, this provision could put the fox in charge of the hen house.

Another problematic provision expands the so-called, "share-in-savings" contracts. Under a share-in-savings contract, the contractor agrees to bear the initial project costs, often entailing capital outlays, until the client agency begins to achieve specified results from the work. Payment is based on a percentage of the savings realized by the agency.

These contracts sound great, but they could rapidly become a kind of slush fund. Since the contracts don't require upfront payments, agencies don't have to come to Congress for authorization to enter the contracts. Once again, this removes accountability.

Mr. Chairman, these are major issues with potentially major cost consequences. I know that you want to move this legislation quickly, but it is more important that we do this right rather than doing it fast. Thank you.

[The prepared statement of Hon. Henry A. Waxman follows:]

Statement of the Honorable Henry Waxman, Ranking Minority Member
Committee on Government Reform
Legislative Hearing on
The Services Acquisition Reform Act

April 30, 2003

Thank you, Mr. Chairman. Today we will hear testimony about the Service Acquisition Reform Act (SARA). This legislation was introduced just yesterday. The issues addressed by this legislation are complex and they affect billions of dollars in federal spending. They deserve a thorough and detailed examination.

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Chairman Davis believes that these accounting standards can sometimes be too burdensome. In particular, he is concerned that many smaller companies and start-up companies refuse to do business with the federal government because of the burdens of complying with these standards. Thus, many of the provisions in the bill waive the application of TINA and the cost accounting standards to service contracts by deeming these contracts to be "commercial items." Under existing law, TINA and cost accounting standards do not apply to contracts for commercial items on the theory that market forces keep prices down for commercial items.

Mr. Davis may have a point. We do need to ensure that smaller companies and other companies that don't normally do business with the federal government are able to do so.

But we must do so in a way that protects the taxpayer against waste, fraud, and abuse. We need to retain that balance.

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Mr. Chairman, these are major issues, with potentially major cost consequences. I know that you want to move the legislation quickly. But it is more important that we do this right than we do it fast.

Chairman TOM DAVIS. Thank you very much, Mr. Waxman. We have a spirited debate on this issue. I think we come at it from different directions, but I appreciate your comments and look forward to working with you.

In the interest of time, Members can have 5 legislative days to submit any further opening statements for the record.

Are there any other Members who wish to make a statement at this time on my side? Any Members wish to make a statement? Are there any Members who wish to make a statement?

[No response.]

Chairman TOM DAVIS. If not, let's move to our first panel. We have Mr. William Woods, Director of Contracting Issues, U.S. General Accounting Office; Mr. Stephen Perry, the Administrator of the General Services Administration, and Ms. Angela Styles, who is the Administrator of the Office of Federal Procurement Policy of the Office of Management and Budget.

It is the policy of the committee that all witnesses be sworn in before they testify. Would you please rise with me and raise your right hands?

[Witnesses sworn.]

Chairman TOM DAVIS. Thank you very much for your time. All of you are pronounced experts in the field. What I would like you to do, we will start, Mr. Woods, with you, move down to Administrator Perry, and then to Ms. Styles.

Try to do 5 minutes, if you can. We have your total statements in the record. I have read them. Members have had an opportunity to read it and base questions on your total statements, which will be included in the record.

But if you could sum it up in 5 minutes—we have a light down here, and when it turns orange, that means that you have 1 minute remaining. When it is green you have up to 4 minutes, and then when it is red, the 5-minute limit, you could move to sum up.

Mr. Woods, we will start with you, and thank you for being with us.

STATEMENTS OF WILLIAM WOODS, DIRECTOR, CONTRACTING ISSUES, U.S. GENERAL ACCOUNTING OFFICE; STEPHEN PERRY, ADMINISTRATOR, U.S. GENERAL SERVICES ADMINISTRATION; AND ANGELA STYLES, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Mr. WOODS. Thank you, Mr. Chairman. It is a real pleasure to be here. We appreciate the remarks, yours and Mr. Waxman's. Thank you to the rest of the members of the committee for your attention today.

We are here to discuss the Services Acquisition Reform Act [SARA] which is H.R. 1837. The purpose of SARA is to provide agencies with additional tools for addressing a number of acquisition issues. What I would like to do today is to briefly summarize our work addressing a variety of those acquisition issues and also to discuss our views on specific provisions of SARA that are related to some of those reports.

The first report that I would like to start with is one that we are just issuing today to you, Mr. Davis, and to you, Mr. Waxman. It is called, "Federal Procurement Spending and Workforce Trends."

This report took a look at the 10 agencies across the Federal Government that spend the most on acquisition. Basically, that covers about 95 percent of the spending across the Government.

We took a look at 15 key indicators, things that we thought would tell us about the current state of affairs in acquisition spending. We took a look at competition. We took a look at goods versus services. We took a look at the acquisition work force at each of these 10 agencies.

For each of the 15 data elements, you will see in the appendix to the report that it addresses where these agencies stood as of the close of fiscal year 2001. We do not yet have on a governmentwide basis access to the fiscal year 2002 data. We plan to update this report as soon as that information is available.

I will not even begin to summarize all of the findings, but I want to highlight two things. One is, why are we here today and discussing services? The reason is that we see a fairly significant growth in services over the course of the last few years. Our report cites about 11 percent growth, but when you look deeper than that, you find that the issue of services is much more significant.

We have a chart here that is also available in our report, but we thought it was worth bringing this to your attention. These are the 10 agencies that we reviewed, and this chart shows the extent to which these 10 agencies procure services. These percentages on the righthand side are the percent of services, the extent to which services constitute their total acquisition spending.

You can see that six of the agencies, six of these large Federal agencies, spend over 75 percent of their contract dollars on services. A couple of agencies spend close to 100 percent. The Department of Energy, for example, spends about 98 percent of its contract dollars on services.

So this is an important area. It is one that we need to devote a lot of attention to, and we welcome the Services Acquisition Reform Act in addressing these important issues.

The other piece of information that I thought would be particularly important to bring to your attention is that we are going to hear a lot of discussion today about the work force. There is data in this report that show the extent to which our acquisition work force is currently under significant pressures. We all have heard that the acquisition work force has declined in recent years, and you will find data in this report to support that.

But there is a particular piece of information that I want to call your attention to, and that is, what is the workload that the acquisition work force is being asked to address these days? What we found is that across the board, at virtually every agency, the number of small dollar contracts has declined rather significantly. We think this is largely due to the use of the purchase card, for transactions that are relatively low-dollar value, generally under $25,000. These are now being processed using the governmentwide purchase card.

But the other half of that is that acquisitions over $25,000 have grown dramatically. Let me just highlight one example from Mr. Perry's agency, the General Services Administration.

We found that their low-dollar-value contracts had declined 82 percent over the period that we reviewed. Conversely, their large-dollar-value actions have grown by 68 percent. So this demonstrates that our acquisition work force today is being asked to deal with a greater number of higher-dollar-value, more complex actions, and that is something that we need to keep in mind as we consider the rest of the provisions of SARA.

Now how does SARA relate to these issues? I want to just touch on a couple of provisions of SARA that I think are particularly relevant. We spent a fair amount of time last year looking at how commercial companies are dealing with many of the same issues that we are finding agencies having to deal with. We looked at leading companies. We found a number of characteristics in how they are taking a strategic approach and are realizing very significant savings, sometimes on the order of several hundred million dollars, by taking a strategic approach.

The report we issued on this point outlined a number of facts, but I want to just touch on one key one. That is, that all of these companies believed that it was important to start with leadership, that they needed to have what they termed, or what the bill terms anyway, "a Chief Acquisition Officer." It was called different things at different companies, but the concept was the same.

That is that acquisition was raised to a very prominent level within these companies, so that a single individual had responsibility for ensuring that individual could look out over the entire enterprise and bringing to bear the resources at a very senior level to improve their procedures. Section 201 of the Services Acquisition Reform Act would require a Chief Acquisition Officer at Federal agencies across the Government, and we support that provision.

Another provision I want to touch on very briefly is the exchange program, the Government-industry exchange program, that would essentially provide for some of the high-performing individuals on the Government side to spend time with the private sector and, conversely, for private sector individuals to spend periods of time with the Government. We think that provision has enormous potential. It has payoff both during the periods of time that these individuals are with different organizations, but also it provides benefits down the road, when they bring the different perspectives that they learned at their different organizations back to their home organizations.

A couple of other provisions I want to touch on, again very briefly. One is on performance-based contracting. As Mr. Waxman identified, there is a provision that would provide for expanded use of performance-based contracting and would make that provision applicable to commercial items across the government.

The data in our report—you will find this on page 9 of our testimony—shows that there is significant room for growth in the use of performance-based contracting across the board. In fiscal year 2001, the administration had set a target of 10 percent of eligible contracts, those that the Federal Acquisition Regulation deemed to be good candidates for the use of performance-based contract. As

you will see in that chart, it shows that a number of agencies are lagging behind in meeting that goal.

Share-in-savings. We did a report for this committee, looking at how leading companies are implementing a share-in-savings approach. We looked at four companies that had realized some substantial benefits as a result of using share-in-savings.

Our report identified four key criteria that would have to exist before share-in-savings would be an appropriate tool to be used for contracting. Share-in-savings is not something that, in our view, will be useful in large numbers of procurements across the Government, but in certain areas where these four criteria are met, these would be good candidates for share-in-savings, and the bill would provide for that authority across the board.

Last, let me just mention time-and-materials contracts. There is a provision in SARA that would permit the use of time-and-materials contracts for commercial item procurements. We do not know, frankly, the extent to which time-and-materials contracts are used in the private sector. We have not done that work.

What we do know, however, is that the Federal Acquisition Regulation provides that, when agencies use time-and-materials contracts, they are required to have proper safeguards in place to ensure that the Government's interests are protected. The Federal Acquisition Regulation makes this available across the board for various types of procurements. We do not see any reason why that should not be available to commercial item procurements, provided, of course, that the requisite level of surveillance is there to protect the Government's interest.

With that, Mr. Chairman and Mr. Waxman, let me stop there and I will be happy to take whatever questions you have.

[The prepared statement of Mr. Woods follows:]

United States General Accounting Office

GAO

Testimony
Before the Committee on Government Reform, House of Representatives

For Release on Delivery
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CONTRACT MANAGEMENT

Comments on Proposed Services Acquisition Reform Act

Statement of William T. Woods, Director
Acquisition and Sourcing Management

GAO
Accountability * Integrity * Reliability

GAO-03-716T

April 30, 2003

GAO Accountability·Integrity·Reliability

Highlights

Highlights of GAO-03-716T, Committee on Government Reform, House of Representatives

CONTRACT MANAGEMENT

Comments on Proposed Services Acquisition Reform Act

Why GAO Did This Study

Since 1997, federal spending on services has grown 11 percent and now represents more than 60 percent of contract spending governmentwide. Several significant changes in the government—including funding for homeland security—are expected to further increase spending on services. Adjusting to this new environment has proven difficult.

Agencies need to improve in a number of areas: sustaining executive leadership, strengthening the acquisition workforce, and encouraging innovative contracting approaches. Improving these areas is a key goal of SARA.

What GAO Recommends

GAO is not making recommendations.

www.gao.gov/cgi-bin/getrpt?GAO-03-716T.

To view the full report, including the scope and methodology, click on the link above. For more information, contact William T. Woods at (202) 512-4841 or woodsw@gao.gov.

What GAO Found

The growth in spending on service contracts, combined with decreases in the acquisition workforce and an increase in the number of high-dollar procurement actions, create a challenging acquisition environment. It is important that agencies have the authorities and tools they need to maximize their performance in this new environment. The initiatives contained in the Services Acquisition Reform Act (SARA) address a number of longstanding issues in contracting for services and should enable agencies to improve their performance in this area. For example:

Section 201: Chief Acquisition Officers. Appointing a Chief Acquisition Officer would establish a clear line of authority, accountability, and responsibility for acquisition decisionmaking.

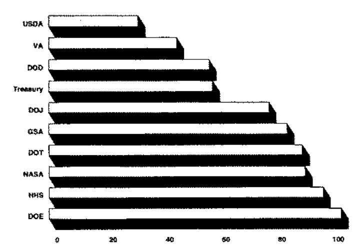
Section 103: Government-Industry Exchange Program. A professional exchange program would allow federal agencies to gain from the knowledge and expertise of the commercial acquisition workforce.

At the same time, GAO is concerned about some provisions in SARA. For example:

Section 211: Ensuring Efficient Payment. While GAO supports the intent of this proposal to make payments to government contractors more timely, GAO has reservations concerning its implementation. GAO's work shows that agencies have been hampered by problems such as high payment volume, inadequate payment systems, and weak controls.

GAO's review of spending and workforce trends in federal procurement highlights the significance of services acquisitions. The table below shows the percent of contract dollars spent on services by federal agencies.

Percent of Contract Dollars Spent on Services In Fiscal Year 2001



Sources: FPDS and FAA.

Mr. Chairman and Members of the Committee:

Thank you for inviting the General Accounting Office (GAO) to participate in today's hearing on the proposed Services Acquisition Reform Act of 2003 (SARA). Over the past several years, the federal acquisition environment has changed dramatically. Spending for services has increased significantly and now represents more than 60 percent of all federal contract spending. At the same time, there has been a reduction in the size of the acquisition workforce, and the use of alternative contracting approaches has been growing. The purpose of SARA is to provide federal agencies with additional tools for addressing these developments. We fully support this objective, and look forward to continuing to work with this Committee and others in finding ways to promote more efficient and effective acquisitions.

In my testimony today, I will:

- Summarize recent trends in contract spending and in the acquisition workforce, and
- Discuss our views on selected provisions of SARA based on relevant GAO reports.

Contract Spending and Workforce Trends

We recently issued several reports on acquisition spending and workforce trends. These reports show that spending on services acquisitions is increasing at a time when the acquisition workforce is decreasing.

Spending Trends

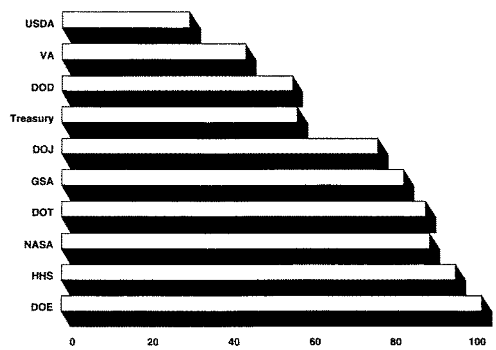
Our report on spending and workforce trends in federal procurement[1] shows that federal agencies continue to buy far more services than goods. Since 1997, spending on services has grown 11 percent. In fiscal year 2001, over 60 percent of the more than $220 billion in goods and services purchased by the federal government was for services.[2] At six agencies,

[1] *Federal Procurement: Spending and Workforce Trends*, GAO-03-443 (Washington, D.C.: Apr. 30, 2003).

[2] Federal agencies spent about $140 billion on services and about $81 billion on goods for contracts valued at more than $25,000. The Federal Procurement Data System does not provide similar information for contracts valued at $25,000 or less. However, the combined total of purchases of goods and services for fiscal year 2001 was more than $235 billion.

procurement of services exceeded 75 percent of their total spending on contracts; at one agency, the Department of Energy, nearly 100 percent of total spending via contracts was for services (see fig. 1).

Figure 1: Percent of Contract Dollars Spent on Services in Fiscal Year 2001



Sources: FPDS and FAA.

Spending on services could increase even further, at least in the short term, given the President's recent request for additional funds for defense and homeland security. The degree to which individual agencies are currently contracting for services and the growth of services spending underscore the importance of ensuring that service acquisitions are managed properly.

Workforce Challenges

Industry and government experts alike recognize that the key to a successful transformation toward a more effective acquisition system is having the right people with the right skills. To increase the efficiency and effectiveness of acquiring goods and services, the government is relying more on judgment and initiative versus rigid rules to make purchasing decisions.

Agencies have to address governmentwide reductions in the acquisition workforce. At the same time, government contract actions exceeding

$25,000 have increased significantly—by 26 percent between fiscal years 1997 and 2001 (see table 1).

Table 1: Federal Acquisition Personnel and Workload

	Acquisition workforce		Changes in contract actions, fiscal years 1997 through 2001		
Agency	Total Sept. 2001	Percent change in workforce since fiscal year 1997	Change in total contract actions (percent)	Change in contract actions exceeding $25,000 (percent)	Change in contract actions under $25,000 (percent)
Governmentwide	103,053	-5	-6	26	-7
DOD	68,513	-9	5	27	4
USDA	5,703	-6	-79	25	-81
DOE	1,449	10	4	19	-3
GSA	2,743	11	-75	68	-82
HHS	2,490	9	-29	44	-31
DOJ	1,457	-2	-11	26	-13
NASA	1,246	-4	-38	-12	-50
DOT	1,514	-7	-37	27	-48
Treasury	2,561	8	12	15	11
VA	2,562	-6	29	-12	30

Sources: OPM, FPDS, and FAA.

Over the past year, GAO issued four reports on the management and training of the government's acquisition workforce.[3] While the agencies[4] we reviewed are taking steps to address their future acquisition workforce needs, each is encountering challenges in their efforts. In particular, shifting priorities, missions, and budgets have made it difficult for agencies to predict, with certainty, the specific skills and competencies the acquisition workforce may need.

[3] *Acquisition Workforce: Department of Defense's Plans to Address Workforce Size and Structure Challenges*, GAO-02-630 (Washington, D.C.: Apr. 30, 2002); *Acquisition Workforce: Status of Agency Efforts to Address Future Needs*, GAO-03-55 (Washington, D.C.: Dec. 18, 2002); *Acquisition Workforce: Agencies Need to Better Define and Track the Training of Their Employees*, GAO-02-737 (Washington, D.C.: Jul. 29, 2002); and *Acquisition Management: Agencies Can Improve Training on New Initiatives*, GAO-03-281 (Washington, D.C.: Jan. 15, 2003).

[4] Department of Defense (DOD), General Services Administration (GSA), National Aeronautics and Space Administration (NASA), the Department of Energy (DOE), the Department of Veterans Affairs (VA), the Department of the Treasury, and the Department of Health and Human Services (HHS).

Training is critical in ensuring that the acquisition workforce has the right skills. To deliver training effectively, leading organizations typically prioritize and set requirements for those in need of training to ensure their training reaches the right people. Agencies we reviewed[5] had developed specific training requirements for their acquisition workforce and had efforts underway to make training available and raise awareness of major acquisition initiatives. However, they did not have processes for ensuring that training reaches all those who need it. And while agencies had also developed a variety of systems to track the training of their personnel, they experienced difficulties with these systems.

GAO Work Related to SARA

We have issued a number of reports on key provisions of SARA. These reports address the areas of acquisition leadership, workforce, contract innovations, as well as other proposals.

Leadership

Section 201: Chief Acquisition Officer

Our discussions with officials from leading companies, which we reported on last year,[6] indicate that a procurement executive or Chief Acquisition Officer plays a critical role in changing an organization's culture and practices. In response to many of the same challenges faced by the federal government—such as a lack of tools to ensure they receive the best value over time—each of the companies we studied changed how they acquired services in significant ways. For example, each elevated or expanded the role of the company's procurement organization; designated "commodity" managers to oversee key services; and/or made extensive use of cross-functional teams. Taking a strategic approach paid off. One official, for example, estimated that his company saved over $210 million over a recent 5-year period by pursuing a more strategic approach.

Bringing about these new ways of doing business, however, was challenging. To overcome these challenges, the companies found they

[5] The agencies we reviewed for the two reports on training included Department of Defense (DOD), General Services Administration (GSA), National Aeronautics and Space Administration (NASA), the Department of Energy (DOE), the Department of Veterans Affairs (VA), Department of the Treasury, the Department of Health and Human Services (HHS) and the Federal Aviation Administration (FAA).

[6] *Best Practices: Taking a Strategic Approach Could Improve DOD's Acquisition of Services,* GAO-02-230 (Washington, D.C.: Jan. 18, 2002).

needed to have sustained commitment from their senior leadership—first, to provide the initial impetus to change, and second, to keep up the momentum.

Section 201 of SARA would create a Chief Acquisition Officer (CAO) within each civilian executive agency. We support this provision. By granting the CAO clear lines of authority, accountability, and responsibility for acquisition decision-making, SARA takes a similar approach as leading companies in terms of the responsibility and decision-making authority of these individuals.

Acquisition Workforce

Section 103: Government-Industry Exchange Program

Comptroller General David Walker testified earlier this month[7] that strategic human capital management must be the centerpiece of any serious government transformation effort and that federal workers can be an important part of the solution to the overall transformation effort. In July 2001,[8] he recommended that Congress explore greater flexibilities to allow federal agencies to enhance their skills mix by leveraging the expertise of private sector employees through innovative fellowship programs.

The acquisition professional exchange program proposed in section 103 of SARA could enhance the ability of federal workers to successfully transform the way the federal government acquires services. The program, which is modeled after the Information Technology Exchange Program included in the recently passed E-Government Act of 2002,[9] would permit the temporary exchange of high-performing acquisition professionals between the federal government and participating private-sector entities.

We support this provision, which begins to address a key question we face in the federal government: Do we have today, or will we have tomorrow, the ability to manage the procurement of the increasingly sophisticated services the government needs? Following a decade of downsizing and

[7] *Human Capital: Building on the Current Momentum to Address High-Risk Issues,* GAO-03-637T (Washington, D.C.: Apr. 8, 2003).

[8] *Human Capital: Building the Information Technology Workforce to Achieve Results,* GAO-01-1007T (Washington, D.C.: July 31, 2001).

[9] Public Law 107-347, Section 209.

curtailed investments in human capital, federal agencies currently face skills, knowledge, and experience imbalances that, without corrective action, will worsen. The program established by section 103 would allow federal agencies to gain from the knowledge and expertise of private-sector professionals and entities.

Section 102: Acquisition Workforce Training Fund

Section 102 of SARA would establish an acquisition workforce training fund using five percent of the fees generated by governmentwide contract programs. We recently completed a review of fees charged on governmentwide contracts—covering all five designated executive agencies for governmentwide acquisition contracts and the General Services Administration's Schedules program.[10] The Office of Management and Budget's guidance directs agencies operating governmentwide information technology contracts to transfer fees in excess of costs to the miscellaneous receipts account of the U.S. Treasury's General Fund. Further, some of these contracts operate under revolving fund statutes that limit the use of fees to the authorized purposes of the funds.

Quality training is important, and we recognize the need for adequate funds for training. In our view, however, the procuring agencies should ensure that adequate funding is available through the normal budgeting process to provide the training the acquisition workforce needs. We are concerned about relying on contract program fees–which can vary from year to year and which are intended to cover other requirements–as a source of funding for such an important priority as workforce training.

Innovative Contracting

Several sections of SARA would encourage the use of innovative contract types that could provide savings to the government. For example, performance-based contracts can offer significant benefits, such as encouraging contractors to find cost-effective ways of delivering services. Share-in-savings contracting, one type of performance-based contracting, is an agreement in which a client compensates a contractor from the financial benefits derived as a result of the contract performance.

[10] *Contract Management: Interagency Contract Program Fees Need More Oversight,* GAO-02-734 (Washington, D.C.: July 25, 2002). Our review showed that in some years contract fees exceeded costs and in others the fees fell short of covering the costs incurred. From fiscal year 1999 to 2001, the revenue generated by the GSA's Schedules program fees exceeded program costs by over 50 percent. We recommended that the fee be adjusted. Based on our recommendation, GSA initiated action toward a 25-percent reduction in the fee it charges for using the Schedules program.

Section 301: Share-in-Savings Initiatives

Share-in-savings contracting can motivate contractors to generate savings and revenues for their clients. We issued a report earlier this year in response to your request that we determine how the commercial sector uses share-in-savings contracting.[11] We examined four commercial share-in-savings contracts and identified common characteristics that made them successful.

In the commercial share-in-savings contracts we reviewed, we found four conditions that facilitated success:

- **An expected outcome is clearly specified.** By outcomes, we mean such things as generating savings by eliminating inefficient business practices or identifying new revenue centers. It is critical that a client and contractor have a clear understanding of what they are trying to achieve.
- **Incentives are defined.** Both the client and contractor need to strike a balance between the level of risk and reward they are willing to pursue.
- **Performance measures are established.** By its nature, share-in-savings cannot work without having a baseline and good performance measures to gauge exactly what savings or revenues are being achieved. Agreement must be reached on how metrics are linked to contractor intervention.
- **Top management commitment is secured.** A client's top executives need to provide contractors with the authority needed to carry out solutions, since change from the outside is often met with resistance. They also need to help sustain a partnership over time since relationships between the contractor and client can be tested in the face of changing market conditions and other barriers.

The companies in our study found that successful arrangements have generated savings and revenues. In one case highlighted in our report, $980,000 was realized in annual energy savings.

We have not found share-in-savings contracting to be widespread in the commercial sector or the federal government. Excluding the energy industry, we found limited references to companies or state agencies that use or have used the share-in-savings concept. In addition, there are few documented examples of share-in-savings contracting in the federal

[11] *Contract Management: Commercial Use of Share-in-Savings Contracting,* GAO-03-327 (Washington, D.C.: Jan. 31, 2003).

government. Officials in federal agencies we spoke with noted that such arrangements may be difficult to pursue given potential resistance and the lack of good baseline performance data. In addition, in previous work,[12] Department of Energy headquarters officials told us they believe such contracts can be best used when federal funding is unavailable.

To achieve the potential benefits from the use of share-in-savings contracting, it may be worthwhile to examine ways to overcome potential issues. For example, in a letter to the Office of Federal Procurement Policy in March of this year,[13] we recognized that share-in-savings contracting represents a significant change in the way the federal government acquires services. To address this challenge, we underscored the need for the Office of Federal Procurement Policy to develop guidance and policies that could ensure that (1) appropriate data are collected and available to meet mandated reporting requirements regarding the effective use of share-in-savings contracting, and (2) members of the federal acquisition workforce understand and appropriately apply this new authority.

Section 401: Additional Incentives for Use of Performance-Based Contracting for Services

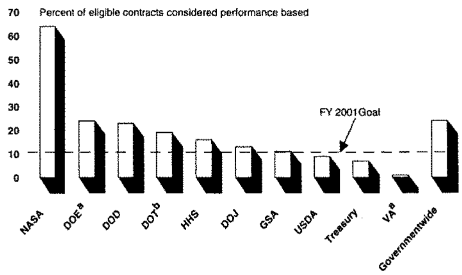
Section 401 authorizes agencies to treat a contract or task order as being for a commercial item if it is performance-based—that is, it describes each task in measurable, mission-related terms, and identifies the specific outputs—and the contractor provides similar services and terms to the public. This provision, which would only apply if the contract or task order were valued at $5 million or less, would provide another tool to promote greater use of performance-based contracting.

Our spending and workforce trends report shows that in fiscal year 2001, agencies reported that 24 percent of their eligible service contracts, by dollar value, were performance-based. However, there was wide variation in the extent to which agencies used performance-based contracts. As figure 2 shows, 3 of the 10 agencies in our review fell short of the Office of Management and Budget's goal that 10 percent of eligible service contracts be performance-based.

[12] *Energy Conservation: Contractor's Efforts at Federally Owned Sites*, GAO/RCED-94-96 (Washington, D.C.: Apr. 29, 1994).

[13] *Contract Management: OFPP Policy Regarding Share-in-Savings Contracting Pursuant to the E-Government Act of 2002*, GAO-03-552R (Washington, D.C.: Mar. 24, 2003).

Figure 2: Percentage of Eligible Contracts Considered Performance Based



Source: FPDS.

[a] DOE and VA officials stated that their internal data systems report a higher use of performance-based contracting in fiscal year 2001 than the data in FPDS. For example, DOE officials believed 77 percent of their eligible contracts were performance based, while VA officials believed their agency's figure should be about 11 percent.

[b] Figure reflects data for DOT only; FAA could not provide performance-based service contracting data because it was not an integral part of its management information systems.

In our September 2002 report,[14] we recommended that the Administrator of the Office of Federal Procurement Policy clarify existing guidance to ensure that performance-based contracting is appropriately used, particularly when acquiring more unique and complex services that require strong government oversight. If section 401 is enacted, we believe that clear guidance will be needed to ensure effective implementation. The Office of Federal Procurement Policy might be assisted in developing and updating meaningful guidance by establishing a center for excellence to identify best practices in service contracting, as required by section 401. A center for excellence may help federal agencies learn about successful ways to implement performance-based contracting.

[14] *Contract Management: Guidance Needed for Using Performance-Based Service Contracting,* GAO-02-1049 (Washington, D.C.: Sept., 23, 2002).

Section 501: Authority to Enter Into Certain Procurement-Related Transactions and to Carry Out Certain Prototype Projects

Section 501 would authorize those civilian agencies approved by the Office of Management and Budget to use so-called "other transactions" for projects related to defense against or recovery from terrorism, or nuclear, biological, chemical, or radiological attacks. Other transactions are agreements that are not contracts, grants, or cooperative agreements. This authority would be similar to that currently available to the Departments of Homeland Security and Defense.

Because statutes that apply only to procurement contracts do not apply to other transactions, this authority may be useful to agencies in attracting firms that traditionally decline to do business with the government. In fact, our work shows that the Department of Defense has had some success in using other transactions to attract nontraditional firms to do business with the government. Our work also has shown, however, that there is a critical need for guidance on when and how other transactions may best be used. The guidance developed by the Department of Defense may prove helpful to other agencies should the Congress decide to expand the availability of other transaction authority.

Additional Comments on SARA Proposals

Section 211: Ensuring Efficient Payment

Section 211 provides for a streamlined payment process under which service contractors could submit invoices for payment on a biweekly or a monthly basis. Biweekly invoices would be required to be submitted electronically.

While we support the intent of this proposal—to make payments to government contractors more timely—implementation of this provision could result in increased improper payments and stress already weak systems and related internal controls. Agency efforts to address improper payment problems have been hampered by high payment volume, speed of service, inadequate payment systems and processes, internal control weaknesses, and downsizing in the acquisition and financial management community. Until federal agencies make significant progress in eliminating their payment problems, requirements to accelerate service contract payments would likely increase the risk of payment errors, backlogs, and late payment interest.

Section 213: Agency Acquisition Protests

Section 213 would provide for agency-level protests of acquisition decisions alleged to violate law or regulation. An agency would have

20 working days to issue a decision on a protest, during which time the agency would be barred from awarding a contract or continuing with performance if a contract already had been awarded. If an agency-level protest were denied, a subsequent protest to GAO that raised the same grounds and was filed within 5 days would trigger a further stay pending resolution of that protest.

We believe that a protest process that is effective, expeditious, and independent serves the interests of all those involved in or affected by the procurement system. Section 213 appears to address each of these criteria. First, although protests currently may be filed with the procuring agencies, section 213 would provide for a more effective agency-level protest process by requiring that an agency suspend, or "stay," the procurement until the protest is resolved. Second, the process would be relatively expeditious because decisions would be required within 20 working days. Having an expeditious process at the agency is especially important because section 213 would provide for a stay both during the agency-level protest and then during any subsequent GAO protest. It should be noted, though, that 20 working days may not be adequate for a thorough review, particularly in complex procurements. Finally, requiring protests to be decided by the head of the agency may help to mitigate longstanding concerns about a perceived lack of independence when decisions on agency-level protests are issued by officials closely connected with the decision being protested.

Section 402: Authorization of Additional Commercial Contract Types

Section 402 would provide for a change to the Federal Acquisition Regulation to include the use of time-and-materials and labor-hour contracts for commercial services commonly sold to the general public. This change would make it clear that such contracts are specifically authorized for commercial services.

The Federal Acquisition Regulation states that a time-and-materials contract may be used only when it is not possible to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. Therefore, adequate surveillance is required to give reasonable assurance that the contractor is using efficient methods and effective cost controls.

Section 404: Designation of Commercial Business Entities

Section 404 would designate as a commercial item any product or service sold by a commercial entity that over the past 3 years made 90 percent of its sales to private sector entities. We are concerned that the provision allows for products or services that had never been sold or offered for sale in the commercial marketplace to be considered a commercial item. In

such cases, the government may not be able to rely on the assurances of the marketplace in terms of the quality and pricing of the product or service.

Conclusion

The growth in spending on service contracts, combined with decreases in the acquisition workforce and an increase in the number of high-dollar procurement actions, create a challenging acquisition environment. It is important that agencies have the authorities and tools they need to maximize their performance in this new environment. The initiatives contained in SARA address a number of longstanding issues in contracting for services, and should enable agencies to improve their performance in this area.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions you may have.

Contact and Acknowledgments
For further information, please contact William T. Woods at (202) 512-4841. Individuals making key contributions to this testimony include Blake Ainsworth, Christina Cromley, Timothy DiNapoli, Gayle Fischer, Paul Greeley, Oscar Mardis, and Karen Sloan.

Chairman TOM DAVIS. Thank you very much.

Mr. Perry, thanks for being with us.

Mr. PERRY. Thank you, Chairman Davis, Congressman Waxman, members of the committee. Thank you for inviting me to appear before you today and discuss how we might improve the current Federal acquisition process.

As you know, and you both alluded to the fact, each year the Federal Government spends about $265 billion in goods and services necessary to provide Government programs to the American people. That is one very good reason why this is a vitally important subject and that the Government's acquisition process should, in fact, focus on efficiency, effectiveness, and accountability.

I have submitted a copy of my full testimony for the record. So at this point, Mr. Chairman, I would like to just summarize some of the highlights of GSA's comments on the proposed legislation. We have not reviewed the actual legislation, so my testimony is based upon the summary that your staff provided to our agency.

My first comment is on the issue of training, and, Mr. Chairman, I would certainly emphatically agree that ongoing training of the Federal acquisition work force is an essential part of improving the Federal acquisition process. GSA is committed to pursuing an effective training program for our acquisition work force, and we agree that this must be accomplished throughout the entire Government.

On the second item, the issue of the Acquisition Officer, we support the concept of having a Chief Acquisition Officer, just as we do at GSA. We believe that a Chief Acquisition Officer is critical to the successful acquisition process at GSA. For that reason, we believe that the legislation calling upon agency heads to establish a Chief Acquisition Officer position would certainly signal the importance of maintaining a well-managed, integrated, agencywide acquisition plan and process.

We also support the idea of creating a Chief Acquisition Officers' Council. This would allow for the sharing of best practices on acquisition policies and requirements across agencies. This council could also provide a forum for the development of innovative acquisition initiatives and the promotion of effective business practices in the Federal Government's acquisition system.

With respect to the review of laws and policies, we support a review of acquisition laws and policies with a view toward ensuring a greater use of commercial practices, when appropriate, including practices such as performance-based contracting. Such a review could result in recommendations for the repeal or amendment of laws and regulations that are unnecessary for the effective, efficient, and fair award and administration of Government contracts.

We also support the new definition of the word "acquisition" that would encompass the entire spectrum of acquisition processes, starting with the development of an agency's requirements through the completion of all aspects of contract administration. This, obviously, would enable all parties, even beyond the Contracting Officers of organizations, to understand their role and responsibility with respect to this activity.

We continue to support your attempt to increase the use of performance-based contracts on a governmentwide basis. We know that performance-based contracting allows private sector companies

to offer innovative solutions to complex acquisition challenges. Successful use in Government would require developing skills in designing tasks in measurable, mission-related terms and defining required outcomes which are critical to successful contracting, and it would follow that rewarding contractors for meeting challenging performance goals would promote efficiency in Government operations and provide greater value to taxpayers.

On the issue of increasing our use of time-and-materials contracts, which is the fastest-growing sector of GSA's multiple-award schedules program especially the acquisition of services. While authorizing additional commercial contract types, such as time-and-materials and labor-hour contracts with appropriate safeguards, this legislation could ensure that the Government's acquisition program has the flexibility needed for additional effectiveness in the acquisition of services.

In summary, Mr. Chairman and members of the committee, we believe that the Service Acquisition Reform Act of 2003 is innovative. Its enactment would, in fact, enable or help establish a modern, effective acquisition process governmentwide, one that can meet the challenges and opportunities that we face.

Thank you for inviting me to discuss this. I would be happy to answer questions, and I certainly look forward to working with you on this.

[The prepared statement of Mr. Perry follows:]

STATEMENT OF
STEPHEN A. PERRY

ADMINISTRATOR
OF
GENERAL SERVICES

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

APRIL 30, 2003

INTRODUCTION

CHAIRMAN DAVIS, MEMBERS OF THE COMMITTEE, THANK YOU FOR INVITING ME TO APPEAR BEFORE YOU TODAY TO DISCUSS IDEAS ON HOW TO IMPROVE THE CURRENT FEDERAL ACQUISITION PROCESS. CHAIRMAN DAVIS, I WOULD LIKE TO TAKE THIS OPPORTUNITY TO THANK YOU IN PARTICULAR FOR YOUR LEADERSHIP IN THIS AREA OVER THE YEARS, AND FOR BRINGING THE NEED FOR ADDITIONAL ACQUISITION REFORM TO THE ATTENTION OF CONGRESS.

AS YOU KNOW, EACH YEAR, THE FEDERAL GOVERNMENT SPENDS APPROXIMATELY $265 BILLION ON GOODS AND SERVICES IN ORDER TO MEET AGENCY REQUIREMENTS TO PROVIDE GOVERNMENT PROGRAMS AND SERVICES TO THE AMERICAN PUBLIC. THAT IS WHY IT IS VITALLY IMPORTANT FOR THE GOVERNMENT'S ACQUISITION PROCESS AND REGULATIONS TO FOCUS ON EFFICIENCY, EFFECTIVENESS AND ACCOUNTABILITY. ADDITIONALLY, THE ACQUISITION PROCESS AND REGULATIONS SHOULD BE BASED ON COMMON SENSE AND EASILY UNDERSTOOD BY ALL THE PARTIES INVOLVED IN THE PROCESS. FINALLY, WHEN APPROPRIATE, THE ACQUISITION PROCESS AND REGULATIONS SHOULD RESEMBLE COMMERCIAL SECTOR BUYING PROCEDURES.

(GSA'S) ROLE IN IMPROVING THE OVERALL FEDERAL GOVERNMENT'S ACQUISITION PROCESS

AS YOU KNOW, GSA MANAGES A SIGNIFICANT PORTION OF THE FEDERAL GOVERNMENT'S ACQUISITION PROCESS. WE OFFER GOODS AND SERVICES -- SUCH AS WORKSPACE, OFFICE EQUIPMENT, COMPUTERS, TELECOMMUNICATIONS, VEHICLES AND FURNITURE --TO OUR CUSTOMER AGENCIES. THROUGH GSA'S EFFICIENT AND EFFECTIVE PROCUREMENT AND PROPERTY MANAGEMENT SERVICES, WE HELP FEDERAL AGENCIES TO BETTER SERVE THE PUBLIC. AS THE FEDERAL GOVERNMENT'S ACQUISITION AGENCY, WE AT GSA RECOGNIZE THE NEED TO CONSTANTLY SEEK WAYS TO IMPROVE THE GOVERNMENT WIDE ACQUISITION PROCESS -- AND TO USE GSA'S EXPERTISE TO HELP PROVIDE BEST VALUE FOR THE GOVERNMENT AND THE TAXPAYERS.

TRAINING

WE ARE CONVINCED THAT ONGOING TRAINING OF THE FEDERAL ACQUISITION WORKFORCE IS AN ESSENTIAL PART OF IMPROVING THE FEDERAL ACQUISITION PROCESS, JUST AS IT IS CRITICAL TO EACH AGENCY'S SUCCESSFUL PERFORMANCE. GSA IS COMMITTED TO PURSUING THE MOST RIGOROUS AND EFFECTIVE TRAINING REGIMES FOR OUR ACQUISITION WORKFORCE.

THE FEDERAL ACQUISITION INSTITUTE (FAI) IS CHARGED WITH PROMOTING THE DEVELOPMENT AND TRAINING OF THE FEDERAL ACQUISITION WORKFORCE. GSA ACTS AS THE EXECUTIVE AGENT FOR FAI. WE PROVIDE FUNDING AND SUPPORT FOR FAI, WHILE THE OFFICE OF FEDERAL PROCUREMENT POLICY PROVIDES POLICY DIRECTION. FAI SETS TRAINING STANDARDS FOR THE FEDERAL ACQUISITION WORKFORCE AND PROVIDES TRAINING THROUGH ITS WEB-BASED FAI ONLINE UNIVERSITY. THE NEED FOR CENTRAL COORDINATION IS KEY TO SUCCESS IN TRAINING INITIATIVES. FAI WILL CONTINUE TO LOOK FOR WAYS TO INCREASE ITS REACH AND MEET THE GOALS INTENDED IN YOUR LEGISLATION. THIS WOULD ENABLE FAI TO PROVIDE FOR MUCH NEEDED DEVELOPMENT AND COORDINATION OF ACQUISITION TRAINING ACROSS THE GOVERNMENT FOR THE NON-DEFENSE AGENCIES.

<u>THE UNIVERSITY OF MULTIPLE AWARD SCHEDULES (OR U-MAS)</u>

ANOTHER EXAMPLE OF OUR EFFORTS IN THIS AREA IS GSA'S FEDERAL SUPPLY SERVICE ON-LINE TRAINING PROGRAM FOR THE FEDERAL ACQUISITION WORKFORCE. THIS VIRTUAL CAMPUS, KNOWN AS THE UNIVERSITY OF MULTIPLE AWARD SCHEDULES (OR U-MAS) IS A SELF-

PACED INTERNET TOOL DESIGNED TO TRAIN THE FEDERAL ACQUISITION WORKFORCE ON THE USE OF THE GSA SCHEDULES PROGRAM. IT IS AVAILABLE ON-LINE, SEVEN DAYS A WEEK, 24 HOURS A DAY.

GSA HUMAN CAPITAL MANAGEMENT INITIATIVE

AS PART OF OUR EFFORT TO DEVELOP THE SKILLED ACQUISITION WORKFORCE WE NEED AT GSA, WE HAVE ESTABLISHED AN APPLIED LEARNING CENTER THAT IS DEVELOPING COMPETENCY-BASED ASSESSMENTS TO DETERMINE SPECIFIC AREAS WHERE OUR TRAINING HAS ACHIEVED POSITIVE RESULTS -- AS WELL AS AREAS WHERE WE STILL HAVE DEFICIENCIES. WE HAVE USED THIS INFORMATION REGARDING THE SKILL MIX OF THE GSA ACQUISITION WORKFORCE TO DEVELOP AND IMPLEMENT A SPECIFIC ACTION PLAN TAILORED TO THE IDENTIFIED TRAINING NEEDS OF OUR AGENCY. GSA HOPES TO OFFER ITS COMPETENCY BASED ASSESSMENT TOOL TO OTHER AGENCIES IN 2004.

SERVICES ACQUISITION REFORM ACT PROVISIONS WILL HELP AGENCIES IMPROVE THEIR ACQUISITION WORKFORCE

ONE EXAMPLE OF HOW CONGRESS CAN HELP AGENCIES IMPROVE THE FEDERAL WORKFORCE IS THE SECTION OF YOUR PROPOSED BILL THAT CALLS FOR A GOVERNMENT-INDUSTRY EXCHANGE PROGRAM. AS YOU KNOW, THIS PROGRAM PERMITS AGENCIES TO DETAIL AN ELIGIBLE EMPLOYEE TO A PRIVATE SECTOR ORGANIZATION. SIMILARLY, IT ALLOWS AN ELIGIBLE EMPLOYEE *OF* A PRIVATE SECTOR ORGANIZATION TO WORK TEMPORARILY FOR A FEDERAL AGENCY. THIS TYPE OF PROGRAM COULD PROVIDE AGENCIES SUCH AS GSA WITH THE ABILITY TO FAMILIARIZE ITS ACQUISITION WORKFORCE WITH INDUSTRY BEST PRACTICES. LIKEWISE, THE PRIVATE SECTOR PARTICIPANTS COULD BENEFIT BY BEING INVOLVED IN IMPORTANT GOVERNMENT PROJECTS, GIVING THEM THE OPPORTUNITY TO SEE FIRST HAND HOW THE GOVERNMENT WORKS. THIS KNOWLEDGE, WHEN SHARED WITH THEIR PRIVATE SECTOR COLLEAGUES, WILL HELP FOSTER A BETTER UNDERSTANDING OF FEDERAL BUSINESS PRACTICES AND PROCEDURES. ULTIMATELY, BOTH THE PRIVATE AND PUBLIC SECTORS BENEFIT FROM THIS INNOVATIVE PROGRAM. WE NOTE THAT OTHER AGENCIES HAVE A DIRECT INTEREST IN SUCH A PROGRAM. AT THIS TIME, THE ADMINISTRATION DOES NOT HAVE THE FULL BENEFIT OF THEIR VIEWS ON THIS PROVISION. ONCE SARA IS INTRODUCED, THE

ADMINISTRATION WILL BE ABLE TO OFFER MORE FORMAL VIEWS TO ASSIST THE COMMITTEE IN ITS CONSIDERATION OF THIS LEGISLATION.

TELECOMMUTING

THERE IS MOUNTING EVIDENCE THAT TELECOMMUTING BENEFITS GOVERNMENT OPERATIONS, THE QUALITY OF WORKLIFE FOR FEDERAL WORKERS, AND THE ENVIRONMENT GSA, ALONG WITH THE OFFICE OF PERSONNEL MANAGEMENT (OPM), LAUNCHED AN INTERNET TELEWORK INFORMATION CLEARINGHOUSE FOR FEDERAL EMPLOYEES SO THEY CAN FIND OUT WHAT THE GOVERNMENT OFFERS IN THIS AREA. GSA FURTHER BELIEVES THAT FEDERAL CONTRACTORS SHOULD ALSO BE EXTENDED THE OPPORTUNITY TO TELEWORK. MR. CHAIRMAN, YOUR LEADERSHIP IN THIS AREA HAS BEEN COMMENDABLE AND WE SUPPORT YOUR EFFORTS TO PROVIDE INCENTIVES TO ENCOURAGE CONTRACTORS TO ALLOW THEIR EMPLOYEES TO TELECOMMUTE.

CHIEF ACQUISITION OFFICER

IT IS IMPORTANT TO KEEP IN MIND THAT WITHOUT MANAGEMENT LEADERSHIP, INITIATIVES TO STREAMLINE THE CURRENT ACQUISITION PROCESS COULD, IN THE END, BE RENDERED INEFFECTIVE. THAT IS WHY WE SUPPORT THE CONCEPT OF EACH AGENCY HAVING A CHIEF ACQUISITION OFFICER, JUST AS WE DO AT GSA. WE BELIEVE THAT THE CHIEF ACQUISITION OFFICER IS CRITICAL TO OUR SUCCESSFUL

ACQUISITION STRATEGY. FOR THAT REASON, WE BELIEVE THAT THE PROPOSED LEGISLATION REQUIRING AGENCY HEADS TO ESTABLISH A CHIEF ACQUISITION OFFICER POSITION IS AN INTERESTING PROPOSAL , AND WOULD SIGNAL THE IMPORTANCE OF MAINTAINING A WELL-MANAGED, INTEGRATED, AGENCY-WIDE ACQUISITION PLAN.

CHIEF ACQUISITION OFFICERS COUNCIL

WE ALSO SUPPORT YOUR IDEA OF CREATING A CHIEF ACQUISITION OFFICERS COUNCIL. THIS IS THE NATURAL EXTENSION OF THE CREATION OF THE CHIEF ACQUISITION OFFICER POSITION, AND WOULD ALLOW FOR THE SHARING OF BEST PRACTICES ON ACQUISITION POLICIES AND REQUIREMENTS ACROSS AGENCIES. THIS COUNCIL WOULD ALSO PROVIDE A FORUM FOR THE DEVELOPMENT OF INNOVATIVE ACQUISITION INITIATIVES AND THE PROMOTION OF EFFECTIVE BUSINESS PRACTICES IN THE FEDERAL GOVERNMENT'S ACQUISITION SYSTEM.

REVIEW OF ACQUISITION LAWS AND POLICY

WE LIKEWISE SUPPORT A REVIEW OF ACQUISITION LAW AND POLICY WITH A VIEW TOWARD ENSURING THE GREATER USE OF COMMERCIAL PRACTICES AND PERFORMANCE-BASED CONTACTING. SUCH A REVIEW COULD RESULT IN RECOMMENDATIONS FOR THE REPEAL OR AMENDMENT OF LAWS OR REGULATIONS THAT ARE UNNECESSARY FOR

THE EFFECTIVE, EFFICIENT AND FAIR AWARD AND ADMINISTRATION OF GOVERNMENT CONTRACTS, ENSURING THAT THE GOVERNMENT'S BEST INTEREST ARE PROTECTED. THIS COMPREHENSIVE REVIEW SHOULD GIVE GSA A SOLID BASIS FOR MAKING FURTHER CHANGES TO IMPROVE THE ACQUISITION SYSTEM BASED ON GSA'S EXPERIENCE WITH THE SECTION 800 PANEL (SECTION 800 OF THE DOD AUTHORIZATION ACT OF 1990).

EXPANDED DEFINITION OF THE TERM "ACQUISITION"

WE SUPPORT A NEW DEFINITION OF "ACQUISITION" THAT WOULD ENCOMPASS THE ENTIRE SPECTRUM OF ACQUISITION, STARTING WITH THE DEVELOPMENT OF AN AGENCY'S REQUIREMENTS THROUGH CONTRACT ADMINISTRATION. THIS SHOULD IMPROVE ACQUISITION PLANNING RESULTING IN BETTER PROGRAM MANAGEMENT.

PREFERENCE FOR PERFORMANCE-BASED CONTRACTING

WE CONTINUE TO SUPPORT YOUR ATTEMPT TO INCREASE THE USE OF PERFORMANCE-BASED CONTRACTS GOVERNMENT WIDE. PERFORMANCE-BASED CONTRACTING ALLOWS PRIVATE SECTOR COMPANIES TO OFFER INNOVATIVE SOLUTIONS TO COMPLEX PROBLEMS. DEFINING TASKS IN MEASURABLE, MISSION- RELATED TERMS AND DEFINING REQUIRED OUTPUTS ARE CRITICAL TO SUCCESSFUL SERVICES CONTRACTING, REWARDING CONTRACTORS

FOR MEETING THESE GOALS WILL PROMOTE EFFICIENCY IN GOVERNMENT OPERATIONS AND GREATER VALUE TO THE TAXPAYER. THE MAIN STUMBLING BLOCK TO FULL AND SUCCESSFUL IMPLEMENTATION OF PERFORMANCE-BASED CONTRACTING CONTINUES TO BE TRAINING. THIS IS WHY GSA HAS AWARDED A CONTRACT TO PROVIDE AGENCYWIDE TRAINING ON THE **"7 STEPS GUIDE TO PERFORMANCE BASED SERVICE ACQUISITIONS"** WHICH, WAS DEVELOPED BY AN INTERAGENCY TEAM.

USE OF TIME AND MATERIALS CONTRACTS

AS YOU KNOW, MR. CHAIRMAN, THE MULTIPLE AWARD SCHEDULES PROGRAM HAS BEEN EXTREMELY SUCCESSFUL, AND THE FASTEST GROWING SECTOR OF THE SCHEDULES PROGRAM IS IN THE ACQUISITION OF SERVICES. BY AUTHORIZING ADDITIONAL COMMERCIAL CONTRACT TYPES, SUCH AS TIME AND MATERIAL AND LABOR HOUR CONTRACTS, WITH APPROPRIATE SAFEGUARDS, THIS LEGISLATION COULD ENSURE THAT THE GOVERNMENT'S ACQUISITION PROGRAM HAS THE FLEXIBILITY IT NEEDS TO MEET ITS REQUIREMENTS IN THE PROCUREMENT OF SERVICES.

SUMMARY COMMENTS

THE SERVICES ACQUISITION REFORM ACT OF 2003 IS INNOVATIVE AND SWEEPING IN SCOPE; AND ITS ENACTMENT SHOULD HELP ESTABLISH A FULLY MODERN AND EFFECTIVE ACQUISITION PROCESS – ONE THAT CAN MEET THE CHALLENGES AND OPPORTUNITIES OF THE 21ST CENTURY. WE APPRECIATE YOUR CONTINUED LEADERSHIP, MR. CHAIRMAN, IN BRINGING THESE MATTERS BEFORE THIS COMMITTEE, THE CONGRESS AND THE ADMINISTRATION. AS YOU CAN SEE FROM OUR COMMENTS AND THE VARIOUS INITIATIVES WE'RE WORKING ON AT GSA, WE SHARE YOUR COMMITMENT TO MAKING NEEDED IMPROVEMENT TO THE FEDERAL ACQUISITION PROCESS AND THE FEDERAL ACQUISITION WORKFORCE. WITH THAT IN MIND, WE ARE COMMITTED TO CONTINUING OUR WORK WITH THE COMMITTEE IN OUR COMMON EFFORT TO IMPROVE THE FEDERAL ACQUISITION PROCESS. ONCE AGAIN, THANK YOU FOR INVITING ME TO DISCUSS THIS IMPORTANT ISSUE WITH YOU TODAY. I AM HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE.

Chairman TOM DAVIS. Thank you very much, Administrator Perry.

Ms. Styles, thanks for being with us.

Ms. STYLES. Thank you for having me. Chairman Davis, Congressman Waxman, and members of the committee, I appreciate the opportunity to appear before you today to discuss the Services Acquisition Reform Act of 2003. I thank the committee for engaging the administration in a productive dialog as we seek to address the many procurement challenges related to service contracting.

For our part, the Office of Federal Procurement Policy is pursuing a variety of initiatives to lower costs and improve program performance. These activities include establishing a Federal Acquisition Council, which is a senior-level forum for acquisition officials from over 25 departments and agencies. The council held its first meeting almost 2 weeks ago, and we established four working groups that are working toward very specific, objective goals in human capital, competitive sourcing, performance management, and small business.

We are also strengthening the use of competition in our everyday acquisitions for services. We published proposed changes to the Federal Acquisition Regulation in the Federal Register earlier this month that will improve application of acquisition basics and purchases for services from the multiple-award schedules program.

We are revitalizing the use of performance-based service acquisitions to capitalize on contractor innovation and meeting the Government's needs. An OFPP-sponsored, interagency group is working to make performance-based service acquisitions policies and procedures more flexible and easier to apply. We are also reducing transaction costs and increasing transparency through technological advances.

Finally, we are pushing agencies to improve oversight for purchase cards and to track buyer behaviors, so they can realize cost savings in acquisition and finance operations without wasting hard-earned taxpayer dollars. In pursuing these and other initiatives, I have sought to take advantage of the existing statutory authorities under a framework that has been shaped by the leadership of this committee.

I believe there is more that can and should be done within the existing statutory framework to improve acquisition practices. For this reason, I have not actively sought statutory changes during my tenure as Administrator. At the same time, I recognize that carefully tailored, legislative provisions can complement the administration's efforts to achieve greater return on our investment of Federal resources.

My written testimony for the record is organized around three themes: strengthening the management of the procurement process, improving the use of contract incentives, and taking greater advantage of the commercial marketplace.

I should make one caveat. The comments in my testimony are based on a discussion I had with your staff. Because agencies were not privy to this conversation, my statement does not reflect the benefit of their full insight. After SARA is introduced, which it has been, the administration will be able to offer more formal views to help inform your thinking.

As one major goal, SARA seeks to improve the overall management of the procurement process. Among other things, the new bill would align management structures to better reflect the integrated nature of acquisitions and require studies to identify opportunities for further improvements. In my opinion, both of these efforts have significant merit.

As a second goal, SARA would include various provisions to encourage good contract performance. The new bill would provide motivation for agencies to use performance-based service contracts, codify the use of award-term contracting, expand the application of share-in-savings contracting, and facilitate telecommuting by Federal contractors. With a few caveats, these are generally positive steps.

As a third goal, SARA will take several steps to further facilitate access to the capabilities of the commercial marketplace. Based on my understanding of the revised coverage on time-and-materials and labor-hour contracting, I believe it is a significant improvement over the originally proposed H.R. 3832.

I, however, believe that there are still some serious and unresolved problems with this type of contracting. As an example, at one agency from last year, from February to December 2002, the overall cost of the contract grew from $104 million to $700 million, a sevenfold overrun on a time-and-materials/labor-hour contract. There was no incentive for the contractor to control costs. There is a very real need for appropriate oversight and safeguards in time-and-materials, labor-hour contracts, and their use should recognize these safeguards.

Mr. Chairman, the administration shares many of the committee's desires to strengthen procurement management, to provide better incentives for our contractors, and to take greater advantage of the commercial marketplace. While there are some areas of disagreement, I believe with continued dialog we can reach agreement on a significant number of these legislative provisions that can serve to further our joint vision of a results-oriented and market-driven Government.

I look forward to working with the committee as we work toward the delivery of better value for our agencies and, ultimately, for the taxpayer. Thank you.

[The prepared statement of Ms. Styles follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

STATEMENT OF ANGELA B. STYLES

ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 30, 2003

Chairman Davis, Congressman Waxman, and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the Committee's current plans for the "Services Acquisition Reform Act of 2003" (SARA). Service contracting represents an ever-increasing proportion of our procurement budget, as agencies look to the commercial marketplace for managed solutions to address their varied needs. We must find ways to ensure our officials are effectively positioned within their agencies to manage the acquisition process, our contactors are offered the type of incentives that will motivate them to perform at their best, and our taxpayers are able to reap the full benefit of the marketplace's ingenuity. I thank the Committee for engaging the Administration in productive dialogue to address these important challenges.

For our part, the Office of Federal Procurement Policy (OFPP) is pursuing a variety of initiatives to lower costs and improve program performance to citizens. These activities include:

- Establishing the Federal Acquisition Council (FAC), a senior level forum of acquisition officials to promote effective business practices for the timely delivery of best value goods and services to the agencies. Working closely with OFPP and the Federal Acquisition Regulatory Council, the FAC will ensure each agency is committed and engaged at the highest levels in furthering the priorities of the President's Management Agenda.

- Strengthening the use of competition in our everyday acquisitions for services. Proposed changes to the Federal Acquisition Regulation (FAR), published in the Federal Register earlier this month, will improve application of acquisition basics in purchases for services from the Multiple Award Schedules (MAS) program, just as changes published last summer have laid a foundation for improved ordering from multiple award contracts.

- Revitalizing the use of performance-based services acquisitions (PBSAs) to capitalize on contractor innovation in meeting the government's needs. An OFPP-sponsored inter-agency group is working to make PBSA policies and procedures more flexible and easier to apply.

- Reducing transaction costs and increasing transparency through technological advances. We are seeking to capitalize on the efficiency, transparency, and administrative simplification that technology enables to stimulate the type of robust contractor participation that makes for a successful virtual marketplace.

- Promoting more accountable and strategic management to preserve current flexibilities. We are pushing agencies to improve oversight over their purchase cards and track buying behaviors of their employees so they can realize cost-savings efficiencies in acquisition and finance operations without wasting hard-earned taxpayer dollars.

In pursuing these and other initiatives, I have sought to take advantage of existing statutory authorities under a framework that has been shaped over the past decade through the leadership of this Committee. I believe there is more that can, and should, be done within this framework to improve acquisition practices. For this reason, I have not actively sought significant statutory change during my tenure as Administrator. At the same time, I recognize that carefully tailored legislative provisions can complement the Administration's efforts to achieve greater return on our investment of federal resources.

This morning, I would like to offer some general observations on possible legislative actions that I understand the Committee is considering for SARA. I have organized my comments around three themes: (1) strengthening the management of the procurement process, (2) improving use of contract incentives, and (3) taking greater advantage of the commercial marketplace. These themes were prominent in SARA when the bill was first introduced in the last session of Congress, as H.R. 3832, and I understand they will form the backbone of the new bill. As you will hear, I think there are a number of concepts that can form the core for meaningful legislation.

I should make one caveat at the outset of my statement. The comments that follow are based on a discussion I had with your staff, who recently met with me to describe the Committee's current thinking for SARA. Because agencies were not privy to this conversation, my statement does not reflect the benefit of their full insight. Of course, after SARA is introduced, the Administration will be able to offer more formal views to help inform your thinking as Congress considers the bill. With this proviso in mind, let me now share some preliminary thoughts.

Management of the Procurement Process

As one major goal, SARA would seek to improve the overall management of the procurement process. Among other things, the new bill would align management structures to better reflect the integrated nature of acquisitions and require studies to identify opportunities for further improvements. In my opinion, both of these endeavors have merit.

Increasing the emphasis on the integrated nature of acquisition. As I understand, the Committee intends to propose a variety of provisions for SARA to increase attention on the fact that acquisition is an integrated activity. For example, the bill would codify a standard definition of the term "acquisition" that captures the full cycle of activities, from requirements development to contract financing and contract administration. The bill would further require that each executive agency appoint a "chief acquisition officer" (CAO) who would be responsible both for traditional procurement oversight, such as increasing use of full and open competition, as well as for acquisition management. In addition, the bill would establish a CAO Council to monitor and improve the federal acquisition system.

I share the Committee's desire to foster better integration between traditional contracting functions and related disciplines whose input is critical to successful acquisition. The Administration is finding many benefits in being more mindful of the relationships between the functions that make up the acquisition process. As a general matter, under OMB's capital programming guidance (in Circular A-11, Part 7), agencies must prepare business cases for major capital acquisitions to justify their requests for budget. Business cases must be reviewed in the agency by an executive committee composed of the senior program official, the Chief Financial Officer, the Chief Information Officer, and the senior procurement executive. This senior level review ensures that investments reflect the true needs of all stakeholders to the acquisition process -- not just one vested interest. This process is helping us to identify projects at risk and avoid wasteful duplication of expenditure.

You might also note that in our efforts to carry out the President's vision of a citizen-centric e-Government for acquisition, we have been reshaping information technology (IT) investments in ways that mirror the integrated nature of acquisition. This focus is enabling us to facilitate the migration and leveraging of IT investments to modernized, technology-based infrastructures that harmonize the varying functions that support the acquisition process. Managers across agencies have greater awareness of the activities of their counterparts and, as a result, are in a better position to identify and avoid redundant IT investments. This awareness saves money for the government and can reduce burdens on contractors as well. Creating a government-wide integrated "business partners network," for instance, means that contractors may register once to do business with the government and avoid having to make costly redundant submissions, as they have been required to do in the past. Accurate and up-to-date registration information also promotes timely payment to contractors.

For these reasons, I think there is benefit in several of the steps the Committee is considering to ensure acquisition is approached as a shared responsibility. First, I agree with the Committee's recommendation to codify the definition of "acquisition." Having a statutory definition that captures an integrated vision of the entire spectrum of acquisition will serve as a useful reminder to the community at large that acquisition requires not only the expertise of contracting officials, but also the active participation of program, IT, and finance functions, among others.

Second, I agree with the Committee that senior level commitment to integration is needed if this vision is to be institutionalized across government. In this regard, the creation of a CAO to effectively oversee these integrated activities may be beneficial.

OMB would envision that these appointments be accomplished through use of existing resources.

In the past, when I testified before the Technology and Procurement Policy Subcommittee (TAPPS), I suggested that creation of a CAO not come at the expense of committed attention on traditional procurement activities. There remains a very real ongoing need for attention to the nuts and bolts of contracting -- what I have referred to as "acquisition basics." At the same time, I am increasingly confident that agencies will take the steps necessary to ensure this commitment is fulfilled by CAOs. This confidence is a reflection, in large part, of the progress the Administration has been making to create a performance-based government. The Program Assessment Rating Tool (PART), for example, is laying the foundation for evidence-based funding decisions. In addition, the use of precise action plans on what agencies must deliver, and "traffic light" scorecards to grade progress on priorities, are making the government answerable to the public for results. As these accountability mechanisms take hold, agencies will continue to adjust their management structures, including those related to contracting activities, to ensure effective return on taxpayer investment.

As the bill moves forward, I would suggest that the Committee consider making the appointment of CAOs optional for small agencies with minimal procurement budgets -- e.g., generally agencies that are not members of the President's Management Council (PMC). Such a mandate may be constraining for these agencies.

Third, I strongly support the statutory recognition of a CAO Council and commend the Committee for considering such a provision for its bill. Progress often requires sustained effort, and a properly focused senior-level organization can play a vital

role in delivering the type of ongoing agency commitment required for achieving real results. This reasoning recently led the Administration to establish the FAC. The FAC's charter makes clear that agency efforts are to be effectively aligned with the President's Management Agenda and other priority acquisition initiatives. Consistent with the President's vision for a market-based government, the Council will emphasize initiatives that promote competition, transparency, fairness, integrity, and openness in the federal acquisition process.

OMB has high expectations for the new Council. The PMC worked closely with us in creating a membership that would help deliver results and we would anticipate similar consultation regarding representation on a statutory council.

Studying opportunities for further improvement. SARA would require OFPP to establish an advisory panel to review laws and regulations that hinder the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of government-wide acquisition contracts. OFPP would report to Congress approximately 15 months after SARA is enacted.

I appreciate the benefit that may derive from studying these areas. My office would certainly want to be an active participant in such reviews. However, current funding constraints would significantly limit OFPP's ability to effectively lead an effort of this magnitude. I hope the Committee will take this point into consideration so that a review of these issues receives the level of attention needed to generate the type of meaningful analysis that can form the basis for additional improvements.

Contract incentives

As a second goal, SARA would include various provisions to encourage good contract performance. The new bill would provide motivation for agencies to use PBSA, codify use of award-term contracting, expand application of share-in-savings contracting, and facilitate telecommuting by federal contractors. With a few caveats, these are generally positive steps.

Reinvigorating PBSA. I support efforts to reinvigorate the use of PBSA and take advantage of the innovativeness that is generated when contractors are given the freedom to figure out the best solution to meet the government's needs. An OFPP-sponsored working group is helping to lay the foundation for improved FAR coverage and new practical guidance, such as sample performance-based statements of work. OFPP intends to review data collected by the Federal Procurement Data System (FPDS) to measure PBSA usage. FPDS began collecting data in FY 2001 on whether service contracts are performance-based. This measure will not, by itself, indicate the effectiveness of PBSA. However, the measure will serve as a useful gauge of whether agencies are making PBSA a priority.

SARA would complement these activities by authorizing agencies that apply this concept, and meet certain other conditions, to conduct their acquisitions under FAR Part 12, which is otherwise reserved for commercial item purchases. I support this type of incentive, which builds on a concept first sanctioned by Congress in the FY 01 Defense Authorization Act. The Defense Authorization Act allowed DOD, on a trial basis, to take advantage of Part 12 for PBSA acquisitions that, among other things: (1) were in amounts up to $5 million, and (2) were placed on a firm-fixed price basis. I

understand the Committee proposes permanent authority and the elimination of limitations on both contract type and dollar size of the acquisition.

I recognize that there may be benefit in some broadening of the authority afforded to DOD. However, I would want to ensure, at a minimum, that purchases are not made using cost-type contracts. This limitation serves as a needed safeguard when conducting a purchase using the tools of FAR Part 12, which were geared towards arrangements that provide for tangible results. I also think that, at this point in our transition to PBSA, where we are seeking to gain experience and develop expertise, pilot authority is probably preferable to permanent authority. Pilot authority gives us the opportunity to compare the gains made through the use of PBSA to any potential negative consequences of purchasing non-commercial items under a framework designed for services that have been market tested or have commercial analogs. I would have no objection to a long-term pilot or to significantly increasing the size of eligible acquisitions.

I understand the bill would require OFPP to establish a center of excellence in contracting for services. The center would serve as a clearinghouse for identifying and promoting best practices. While the idea is a sensible one, OFPP may be hard-pressed to effectively lead such an initiative under current funding constraints.

Using award-term contracts. The bill would include a provision allowing an agency to extend a contract by one or more additional periods on the basis of exceptional performance by the contractor. A contract providing for such extension would be required to include performance standards and be performance-based to the maximum extent practicable.

There is intuitive appeal to "award-term" contracting where contractors are offered the opportunity to obtain more work as a mechanism for motivating exceptional performance. This commercial-style practice may create a win-win situation for the government and contractors alike if agencies are vigilant about: (1) conducting new competitions when cost savings are no longer accruing through the existing contract, and (2) limiting the overall term of the contract to a reasonable timeframe so that the full benefit of marketplace competition can be applied to secure favorable pricing and refresh terms and conditions. I plan to discuss award-term contracting with agencies that have used this technique to get a better of sense of how this tool can be used most effectively.

Increasing share-in-savings contracting. The draft bill would build on authority in the E-Government Act that provides for expanded pilots of share-in-savings contacting for IT. SARA would provide permanent share-in-savings authority and permit use of this tool for any need, as opposed to only IT needs.

I appreciate that the Committee is anxious for the government to take advantage of a tool that has been used only rarely since its creation in the Clinger-Cohen Act as well as to permit its application to any type of purchase where the concept may provide benefit. To help ensure successful use of the recently enacted E-Government pilot authority for IT acquisitions, OMB, among other things, will work to ensure that agencies heed the lessons learned by industry, as identified in a recent report by the General Accounting Office (GAO). Namely, there must be thorough and deliberative planning, as well as management commitment, to identify clear outcomes and measures that are agreed upon by both parties to a share-in-savings contract.

As the Committee considers additional applications of share-in-savings contracting, please be aware that OMB is opposed to any expansion of the authority provided in the E-Government Act to waive full funding of termination costs. Agencies should account fully for the government's obligations when they enter into contracts. Further expansion of share-in-savings should not increase the government's exposure to unfunded contingent liabilities, especially given the government's limited experience with this tool and the GAO's caution that the government may face challenges identifying favorable opportunities (at least until we gain experience in establishing appropriate baselines). OMB welcomes the opportunity to work with the Committee to further discuss options for facilitating the successful use of share-in-savings.

Telecommuting. The draft bill would include a provision to recognize the use of telecommuting by federal contractors. The Committee's desire to address this issue is certainly understandable. Telecommuting by contractor employees may enable agencies to realize lower contract prices by lowering the costs for contractors doing business with the government. For this reason, I would agree that agency requirements and evaluation criteria should not generally be used as a basis for disqualifying an offeror who seeks to telecommute or for reducing that offeror's score. Of course, there will be instances where telecommuting will either be undesirable or inconsistent with the government's needs. Thus, agencies will need the ability to *either* render an offer ineligible *or* reduce the scoring of an offeror who seeks to telecommute if the requirements cannot be met in this fashion and the determination is documented in writing.

Access to the commercial marketplace

As a third goal, SARA would take several steps to further facilitate access to the capabilities of the marketplace. I would like to briefly comment on provisions that would: (a) address use of the commercial marketplace for fighting terrorism and (b) expand application of the FAR's commercial item policies.

Combating terrorism. The ongoing war on terrorism has intensified the need for responsive, results-based contracting. The new flexibilities authorized by the Homeland Security Act, which were enacted with this Committee's proactive efforts, represent a reasonable set of tools to help agencies meet the demands associated with protecting our homeland. The FAR was amended earlier this year to implement the emergency procurement flexibilities. OFPP has prepared supplementary (non-regulatory) guidance, which we plan to issue shortly. We have purposely written the guidance in basic terms to facilitate broad distribution and understanding throughout the acquisition community. Our aim is to reinforce successful and confident application of these tools, generally through *common sense* reminders.

I appreciate the potential need for emergency procurement flexibilities beyond the present sunset date of November 24, 2003 and would support their continued availability as the Committee advocates. However, I would prefer that the authorities remain subject to an appropriate sunset date, as opposed to being made permanent, until we have a better sense of their overall effect in helping agencies meet their missions.

Finally, I favorably note the Committee's intention to allow agencies to engage in transactions other than contracts, grants, or cooperative agreements (so-called "other transactions" or OTs) for research and development, including prototype efforts for

purposes of supporting efforts to combat terrorism. By reducing barriers to commercial firms, OTs can broaden the technology base and foster new relationships and practices within the current supplier base.

Expanding application of FAR Part 12 commercial item policies. I understand that the new bill, like H.R. 3832, will contain provisions to expand application of FAR Part 12, which is designed to reduce barriers between the government and sellers of commercial items. Similar to H.R. 3832, one provision would provide express authority for use of a time-and-materials (T&M) contract or labor-hour (L/H) contract for the procurement of commercial services. However, unlike H.R. 3832, the new bill would limit use of these contract types to services that are "commonly sold to the general public through such contracts." A second provision would eliminate caveats in law that currently require that services be sold in substantial quantities, among other things, in order to be considered eligible for Part 12. A third provision would require an agency to purchase the non-commercial items of a "commercial entity" using the clauses and policies prescribed by Part 12 if at least 90 percent (in dollars) of the sales of the enterprise over the past three business years have been made to private sector entities or under FAR Part 12.

The revised coverage on T&M and L/H contracting is an improvement over that originally proposed in H.R. 3832. However, the latter two provisions, which are unchanged from that set forth in H.R. 3832, continue to raise concerns.

T&M and L/H contracting and the definition of commercial service. Last year, the issue of whether use of T&M or L/H contracts should be authorized under FAR

Part 12 appeared to trigger more public dialogue than any other provision of SARA. Some praised the idea, claiming that T&M and L/H contracting will encourage more commercial firms to compete for government business. They pointed out, among other things, that these contract types minimize pricing risk for contractors and allow parties to reach agreement in an administratively simplified manner. Others, such as the Defense Inspector General (DOD IG), opposed the idea of expanding use of T&M and L/H contracting for commercial item purchases. The DOD IG pointed out that T&M contracts, for example, are susceptible to cost growth because profit is built into the hourly billing rate and contractors have little incentive to control cost or increase labor efficiency. The DOD IG cautioned that T&M contracts require a high degree of surveillance. This admonition is hardly limited to DOD. In a hearing earlier this year, one civilian agency IG, discussing experiences with a T&M contract, reported a seven-fold cost overrun, which increased the bill to taxpayers by hundreds of millions of dollars.

My point is not to scare agencies from using T&M contracting, either as a general matter or for the acquisition of commercial items. Rather, I want to reiterate the very real need for appropriate oversight and safeguards if a T&M contract is otherwise appropriate for use. I believe this message is especially important in the context of using T&M contracts in FAR Part 12, because Part 12 was drafted with the expectation that purchases would be made through arrangements that provide payment in return for tangible results. The FAR drafters gave little thought to the risk involved when using a flexibly-priced contract to buy commercial items. Accordingly, if we are to use T&M and L/H contracts

under Part 12, we must do so in a way that ensures the government's interests are adequately protected.

For this reason, I commend the Committee for proposing to limit use of T&M and L/H contracts to procurements of commercial services that are commonly sold to the general public in this fashion. I strongly agree that the government should not, as a general matter, be taking on levels of risk that a smart commercial business would not undertake.

I would further recommend that the Committee retain current requirements for competitive sales in substantial quantities. As a general matter, even where fixed-price contracts are being used, this caveat continues to play an important role in helping the government to manage and mitigate risks. In the case of a T&M contract in particular, an agency will have the assurance that a contractor's services have been purchased repeatedly in the commercial marketplace to help offset the fact that the agency must bear the risk that the arrangement is simply one for best efforts.

In addition, agencies will need to heed the long-standing warning that has always been coupled with T&M contracting -- i.e., that these contracts be used *only* when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. When agencies know their requirements and can meet them with commercial items, they need to negotiate fixed-price arrangements that effectively protect the government's business interest, just as a commercial contractor would do. Indeed, I would challenge anyone to point to an example of where a successful commercial company routinely

accepts the risk of T&M or L/H contracts for commercial needs once they can be definitized.

As SARA moves forward, I plan to work with the other FAR Council members to continue to think about what other steps may need to be taken. But, as you can see, I think the Committee has taken an important positive step in enabling the effective use of T&M and L/H contracting under Part 12.

Commercial entities. The new bill, like H.R. 3832, would require an agency to purchase the non-commercial items of a *commercial entity* using the clauses and polices prescribed by Part 12. In order to do so, we would need to accept the premise that the government will be protected when it buys non-commercial items (i.e., items that are not sold or even of a type offered or sold in the marketplace) as long as the company has a demonstrated track record in selling commercial items at fair and reasonable prices. Unfortunately, I am unable to find any meaningful protection for the taxpayer in accepting the pricing of a non-commercial item based solely on the company's good track record for an unrelated product or service. For this reason, I urge the Committee to reconsider this proposal.

Conclusion

Mr. Chairman, as you have just heard, the Administration shares many of Committee's desires to strengthen procurement management, better incentivize our

contractors, and take greater advantage of the commercial marketplace. While there are some areas of disagreement, I believe that with continued dialogue, we can reach agreement on a significant number of legislative provisions that can serve to further our joint vision of a results-oriented, market-driven government. I look forward to working with the Committee as we work towards the delivery of better value for agencies and the taxpayer.

This concludes my prepared remarks. I am happy to answer any questions you may have.

Chairman TOM DAVIS. Thank you, and thank you all very much. Let me make just a couple of comments and then get into some questions.

First of all, I think, just trying to respond very briefly to a couple of comments made in my friend Mr. Waxman's opening statement, cost-type contracts can't be used under commercial procedures. So the cost accounting standards are not that important.

And, second, the TINA waivers really applied to the certification requirement. The agency still is required to get the information it needs to find the price fair and reasonable.

We often lose some of these firms as competitors in the Government market altogether. Alternatively, such firms may form a separate entity or production line to deal with the Government, at a considerable extra cost to both the consumers and the taxpayers.

For example, a company may sell aircraft in the commercial market that they can also sell similar aircraft under a special configuration to meet Government needs. Normally, one would expect the aircraft to be produced on the same line and under the company's commercial accounting system. But if cost accounting standards or data certification requirements were to apply, the company would have to use a different accounting system and sometimes even a different production line for the products sold to the Government. How does that save anything?

A number of high-tech, commercial IT firms simply refuse to compete for Government business because they refuse to change their perfectly proper and legally sufficient accounting systems to meet Government requirements. So that is our challenge, is how to bring more competitors into the marketplace and how to reduce the costs to taxpayers, and at the same time balance Mr. Waxman's concerns and other concerns expressed here on waste, fraud, and abuse, and making sure that we can have a general check on these items.

Let me ask just a question for each of you to try to get things started. Mr. Woods, share-in-savings contracts is one of the innovative contracting techniques that we promote under SARA. As we know, they can be misused if you use the wrong contracting vehicles. Time-and-materials may not be an appropriate vehicle in some areas.

I know you did work on this issue just recently. Could you elaborate on some of your findings and tell us when this technique has been successful?

And let me just say I used this in Fairfax County. I came in as the head of a county government there where we had no money to spend, and yet we needed IT improvements. That is eventually how we would be able to get more efficient about the way we do things. This was a way we didn't have to upfront the costs. We were able to move and do a lot of things we never would have been able to do, had we not had that vehicle.

So, from our experience, if it is used correctly, it can be a real enhancer. Use it incorrectly—there is a tremendous upside and it needs appropriate oversight and training. I think that is what we are trying to get to.

Go ahead.

Mr. WOODS. And that, Mr. Davis, is essentially what we found in our review of the commercial companies' use. But, in specific answer to your question in terms of what we found, there were four key indicators, four essential ingredients that needed to be in place in order to have successful share-in-savings contracts.

First of all, the outcome needed to be clearly specified. There needed to be agreement between the customer and the provider, if you will, on exactly what they were trying to achieve.

Second, the incentives for the contractor to perform needed to be very clearly defined.

Third, there needed to be performance measures to make sure that there was a way to track whether the outcomes were being achieved and whether progress was being made toward that result.

Then, last, and perhaps even most importantly, there had to be top management commitment because, typically, what we found is that these agreements tended to be most successful over time. That is when the savings kick in, if you will. The initial upfront investment is made by the contractor, but the savings are achieved further downstream. So there had to be an upfront commitment by the companies, by the leadership of the companies, to maintain the arrangement with the contractor. Those are the essential ingredients that we found in our work.

Chairman TOM DAVIS. OK, thank you.

Mr. Perry, let me ask you, you point out in your statement GSA's commitment to training the Federal work force. You note GSA's innovative training initiatives. In your view, would the increased funding that could be made available through SARA's work force training enhance these initiatives in a significant fashion?

Mr. PERRY. Well, certainly, increased funding is part of the formula for success. I was really quite surprised when I first learned the degree to which we at GSA, in terms of our acquisition work force, fell well below the Clinger-Cohen requirements. We have been aggressive in trying to move that up, but we still have a long way to go.

Part of that will have to require resource investment. So the issue of providing resources to make that possible on a faster pace than we have been able to achieve it up to this point certainly is essential.

Chairman TOM DAVIS. OK, thank you.

Ms. Styles, first of all, thanks for working with us as we try to remold this legislation and we continue to try to address some of your concerns as this moves through the legislative process.

SARA would place commercial services on the same level as commercial products. You express a concern about this concept. I am not clear why commercial services shouldn't be put on the same plane as products, and can you give us the differentiation in your view on that?

Ms. STYLES. Sure. I think it is just the extent to which you can determine what the price in the marketplace is. I think you made a very good example when you started off about, why should you be applying cost accounting standards or intricate accounting systems to a contractor if they are selling something that is a service that is available in the commercial marketplace?

I don't know if putting out oil field fires is available in the commercial marketplace, but I assume it is, and I assume it is available in substantial quantities and we could actually go to the commercial marketplace and say, "Here's the price for doing this versus the price that we are paying in the Federal Government."

If you have that data and capacity to look at one service that we are buying in the commercial marketplace and compare it to what we are paying for it in the public sector, that is really what we need. We need the capacity to look at that. As long as it truly is commercial, I think that is fine.

It is a little harder sometimes to compare services than it is commodities, and that is a little bit of the difficulty, but I——

Chairman TOM DAVIS. Because of their uniqueness, basically?

Ms. STYLES. Exactly. That is exactly right.

Chairman TOM DAVIS. OK. Do you think that the provisions in SARA that would expand the coverage of commercial items to include more services and to include items acquired from a commercial entity would encourage the participation of more firms in the commercial market?

Ms. STYLES. I think it certainly could. I have seen it from my perspective in working with defense contractors in the private sector, that they do reorganize based on our requirements and to meet them or not. That may not be the most efficient way for us to be buying from some of these companies.

Whether that is the right solution or not or whether we can come up with another solution, I think we do need to come up with a solution for some of these companies that may be spending more and ultimately charging us more in some of the cost contracts because of the way they structure themselves to meet our needs.

Chairman TOM DAVIS. Thank you very much.

Mr. Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman.

Section 404 of the bill expands dramatically what kinds of products and services can be considered, "commercial" items. Commercial items are exempt from essential safeguards against waste, fraud, and abuse, such as the cost accounting standards. This section would provide that any product or service shall be considered a commercial item if it is produced by an entity whose primary customers are in the private sector at the time the contract is entered into. Specifically, this section provides that if 90 percent of a company's sales over the past 3 years were to non-government entities, then this would apply.

Now if an entity meets this test, it doesn't have to provide any data to the Government to justify its costs and prices under the Truth in Negotiation Act. It doesn't have to account for overhead, travel, management, or other expenses using standard cost accounting standards. In essence, it can charge the Government whatever it wants without oversight.

Moreover, the proposal would allow, and even encourage, contractors to manipulate the system by creating, "special purpose entities" or subsidiaries that are set up specifically to obtain commercial item status for goods or services. Contractors could also make any contract for unique Government items or services exempt from oversight through such manipulation.

Now, Ms. Styles, you have testified that the administration opposes this provision. The DOD IG also opposes this provision. According to the IG, the provision, "would allow contractors to manipulate what is considered a commercial item by creating or reorganizing business entities or allocating contracts to different business entities in order to obtain commercial item status for what are actually military-unique products." Can you elaborate on why you are concerned about this provision?

Ms. STYLES. Certainly. It is more a concern about the method to resolve what I think are some real problems, and what we need to work on is how we resolve some problems that contractors are having in supplying us goods and services, and how they are structured to meet, whether it is cost accounting standards or truth in negotiation or whether it is an issue of something that is commercial that we are not really buying as commercial. So we are putting additional restrictions on there that we may not need to protect our interests.

We certainly were concerned that this would allow a company to sell us something that is not commercial, that is not available in the commercial marketplace, that we wouldn't be able to judge whether the pricing was fair and reasonable pricing or not, because we didn't have sufficient purchases in the commercial marketplace to make that comparison to what we were paying.

Mr. WAXMAN. Mr. Woods, do you have concerns about this provision?

Mr. WOODS. We do have concerns, as Ms. Styles indicated, that when you have a Government-unique item, in many cases you need to have other tools available to help in the pricing decision.

Mr. WAXMAN. Under current law, a service can be considered a commercial item only if they are offered and sold competitively because then you have a marketplace to make judgments. Section 403 would change this definition dramatically. It would expand the number of services that can be considered commercial items. In fact, almost any service that is offered, or that theoretically could be offered, to a private sector purchaser can count as a commercial service under the new definition. Even the contract with Halliburton to extinguish oil well fires in Iraq or contract with Mr. Richard Blum to do work in Iraq as well could potentially qualify under this new definition.

Now the consequences of designating these services as commercial items are profound. They exempt the services from important accountability standards such as the Truth in Negotiation Act and the cost accounting standards, Essentially, they strip the Government of any means to check whether the prices it is paying are reasonable for the services it is receiving.

I believe there is a question of whether the definition of commercial services should be changed. According to the IG, "the current definition of commercial services is a very reasonable definition with safeguards to prevent purchasing non-commercial services. It permits services which are sold competitively and for which a market price can be established, to be treated as commercial services. This provision has permitted the Government to purchase a myriad of services as commercial services."

Ms. Styles and Mr. Woods, how do you respond to the comments of the DOD IG on this?

Ms. STYLES. I think there is room for more flexibility in determining what is commercial in the services arena. We do have to be cautious here. I think we have to recognize that we are cautious and we have to have some certainty that the price we are receiving is fair and reasonable. I think it is a difficult line to draw at times, but I think it is one that we should recognize that we should seek, to the extent we can, some additional flexibilities here.

Mr. WAXMAN. So you disagree with the DOD IG?

Ms. STYLES. No, I don't think it is disagreeing. Well, I mean, he says that we shouldn't change it at all, and I think we should examine that. I think we should look at it and see if we can be more flexible in the services arena.

Mr. WAXMAN. And, Mr. Woods, what are your concerns and analysis? I don't know from Ms. Styles whether she agrees with the definition in the bill or she thinks they ought to be negotiated further to see what that provision should be.

Mr. WOODS. Well, we at GAO, like the rest of this panel, have not yet had a chance to review the precise language in detail.

Mr. WAXMAN. That is a problem.

Mr. WOODS. That said, though, buying services does present very different challenges than goods. Let me give you an example.

We did a report a couple of years ago looking at buying off the General Services Administration Schedule. There are very different procedures for doing that. It is relatively simple when buying goods. You can go to the schedule. You can compare the specifications and the prices.

It is not so easy for services. In fact, GSA has established special ordering procedures for services to highlight the difference.

Just very briefly, in buying services, particularly professional/administrative services, that sort of thing, which the Government is buying more and more of these days, or information technology services in particular, it is not just enough to go to the schedule, for example, and look at the rates that are being charged for various positions or various services that might be provided, such as the rates for different skills categories.

You need to look at the mix of skills. You need to look at how many hours are going to be provided by each of these individuals. So it is a very different process than just ordering goods. So there are some key differences there that we need to take account of.

Mr. WAXMAN. Just yes or no, do you think we ought to go with section 403 as it is in the bill or would you want it changed or eliminated?

Mr. WOODS. Well, I haven't seen the bill, sir, so I can't really comment.

Mr. WAXMAN. OK. Ms. Styles, section 403, is it acceptable?

Ms. STYLES. I have not seen what has been introduced. I think we would still like the constraint of it being sold in substantial quantities, though. We do want to be able to find prices in the commercial marketplace to be able to make the comparison.

Chairman TOM DAVIS. Thank you, and, of course, the whole purpose of this is to allow that Contracting Officer to get—they can de-

termine what is fair and reasonable, but they have to find the data to do it. If they can't, then this doesn't lie.

Instead of having the company certify in this place, we are really putting the onus on the Contracting Officer. But the key here is that these buyers are going to be trained to do this, and they are going to have to make the appropriate substantiations.

So I don't think we are losing anything, but we would be happy to get you the language. If you want to comment on that and get that to Mr. Waxman, I think that would be an important part of the record and we would welcome you doing this. Thank you very much.

Mr. Lewis.

Mr. LEWIS. Yes, thank you, Mr. Chairman.

I guess this question would go to Mr. Woods. Does the increase in contract dollars spent on services, how does that relate to a reduction in civil service personnel? Or does it?

Mr. WOODS. We haven't really looked at those issues in tandem. We are seeing both of those phenomena that you have cited. We see, as indicated, a significant growth in services, and then our work on looking at the civil service side has focused just on the acquisition work force for the area that I am responsible for. So I don't bring any particular expertise across the board in civil service.

Mr. LEWIS. I guess the other question, looking at the decrease in the acquisition work force and the increase in the number of high-dollar procurement actions, was there an increase in contracts or a decrease in contracts in relationship to the procurement actions?

Mr. WOODS. What we find, when we look, relates to contract actions. So it is not contracts, but contract actions. The difference is that, when an agency awards a contract, there are a number of contract actions that would follow from that. Funding changes, just changes to the contract itself in terms of the specification and the work required, task orders that are issued under a multiple award, indefinite delivery contract would qualify as an action. So there are multiple contract actions.

In specific answer to your question, though, we found that, by and large, the number of contract actions has declined somewhat over the 5-year period that we looked at.

Mr. LEWIS. I am wondering, is that because of more centralized purchasing or procurement, and that is in direct relationship to the decrease in the acquisition offices?

Mr. WOODS. That could very well be. The primary explanation, we think, is the use of purchase cards. Purchase cards gets to your point about the acquisition work force. You do not have to be a member of the acquisition work force in order to use a purchase card. That was the design. The theory was, why involve people with detailed contracting expertise when all we need is someone from a program office to make a purchase that is needed at a given point in time? So there has been a decline in the numbers, and a lot of that—there is also seen a decline in the work force, too.

Mr. LEWIS. This piece of legislation that we are talking about today, will that do anything, or can you tell me how it will decentralize the acquisition or the procurement process? Because I have

a feeling that, with regional purchasing, it is a one-size-fits-all-type purchasing philosophy that sometimes causes a lot of waste.

I have seen that. I have Ft. Knox in my district. I have seen that regional purchasing has put them in a situation, where they actually don't receive the things that they actually need where they could have purchased it locally.

So does that do anything to decentralize that process?

Mr. WOODS. I don't believe that there are provisions in SARA specifically on that point. But one of the reasons that we support the Chief Acquisition Officer, for example, is we need a person in the organizations that can take note of issues like you are raising and determine whether we need more consolidated contracting, or in some cases we may very well need less consolidated contracting to meet specific needs. It is only when you have an individual that is at a fairly senior level that can look out across the organization to make those kinds of assessments.

Mr. LEWIS. OK, thank you.

Chairman TOM DAVIS. Mrs. Maloney.

Mrs. MALONEY. Thank you. Thank you, Mr. Davis. I would like to really be associated with the comments of Chairman Waxman. I personally was very concerned that our panels——

Chairman TOM DAVIS. "Chairman Waxman?" [Laughter.]

Mrs. MALONEY. Did I call him "chairman?"

Chairman TOM DAVIS. I will permit a lot of freedom of speech in this hearing.

Mrs. MALONEY. "Leader." Leader Waxman for the Democrats. [Laughter.]

I think he raised some important points. As much as I respect Mr. Davis, I tell you I have deep concerns about this bill, having just read a 68-page bill that I got last night. But I am concerned that the panelists hadn't even seen the bill. I think that we should have another hearing on this after the panelists have seen the bill.

We are the largest consumer in the world. We spend $215 billion in goods and services, and we need to make sure that the taxpayers are protected in this.

I am particularly concerned that the Chief Acquisition Officer, building on my colleague from the other side of the aisle's comments, according to this bill, will not be a career person. To me, when you are making decisions on $215 billion, you should have a career person whose purpose is to serve the Government, not someone who may be a political appointee from a business that they may go back to after they award these contracts to them.

So, at the very least, I have always known that what we worked for was to professionalize the procurement system. Here, if I am reading it correctly, the Chief Acquisition Officer is to be non-career—in other words, political—but non-Senate-confirmed appointees.

This, of course, is in the face of recommendations from many quarters that there should not be political appointees making contracting decisions. I come from a long history of contract abuse from probably the biggest abuser in contracts in the country, New York City. One of our biggest reforms that we did was to make sure that whoever made these decisions was a professional person trained in procurement, not someone who comes in, in one adminis-

tration, is gone the next, and when the scandal hits the front pages, they can say, "I don't know who made that decision. They have already left."

So I want to know, and just start with Ms. Styles and go right down to Mr. Perry, and my eyes are so bad I can't even see your name. Mr. Welsh.

Mr. WOODS. Woods.

Mrs. MALONEY. Woods. Do you believe that the Chief Acquisition Officer should be a political appointee, like what this bill does? Is that not in the face of what procurement history has been and professionalism, not to mention the fact that the IG has come out in opposition to this?

Ms. STYLES. I would like to explain the problem that I see at some agencies now. I certainly think there may be a lot of ways to resolve it, but it is a real problem that we have procurement officers, we have procurement executives at the agencies who have been career people for a long time. With only two, maybe three, exceptions that I can think of in my mind, do they have access to the head of the agency, are they involved in the front end from a program decision perspective, deciding the requirements, knowing what they are, well before you make any decisions about how it is going to be bought from a procurement perspective.

So you can kind of see that our Chief Procurement Officer——

Mrs. MALONEY. So are you saying that we shouldn't have professionals making this, that it should be a political appointee instead? Is that what you are saying?

Ms. STYLES. Well, I am trying to address the problem——

Mrs. MALONEY. Yes, OK.

Ms. STYLES [continuing]. That I perceive here. I think there is a lot of flexibility to figure out how to address the problem, but it is a real problem that we have our procurement executives, with a little "p," focused on the laws and the regulations of procurement, which clearly we need people to do, but the problem in the acquisition arena is that we don't have anybody that focuses on cradle-to-grave acquisition issues.

You can't take that little "p" person and make them a Chief Acquisition Officer and expect in the culture of the agency for them to suddenly be involved in program requirements and management decisions. So you have to figure out——

Mrs. MALONEY. So you think it is better to hire, say, an executive from Lockheed or Bechtel to come in and do this job, instead of a career person?

Ms. STYLES. I don't know what the right answer is here, but I do know that you have to figure out a way to give that person access to the head of the agency and involvement from the front end of procurement decisionmaking. Is that a political person? Well, there is a much greater likelihood that a political person is going to be able to have that upfront involvement from cradle to grave than the little "p" procurement person that we have had.

So there is a problem that needs to be resolved——

Mrs. MALONEY. Excuse me. I am about to blow up. I cannot believe that you said that, that it is better to bring in a political appointee, a revolving door out to private industry, who will benefit

from these contracts, as opposed to strengthening professionals to make these decisions.

But I am taking your challenge. I am offering an amendment right now in the bill that will create a chief procurement—what is it called—Chief Acquisition Officer who will be non-partisan, professional, trained, and that person will have the authority from the beginning to the end to make taxpayer-protection, the benefit-of-our-country decisions on the $215 billion contracts in all of our agencies.

If it is such that our procurement officers cannot make decisions and have no access to what the material is supposed to be, then we need to change that, but certainly the answer is not to go back and bring in political appointees. I find this very, very wrong and very dangerous, particularly when we need to be very careful in protecting our taxpayers' dollars.

And I must say—and I want to say something nice about the chairman—he has consented to come to New York, and we are suffering very deeply from the recession from September 11th, to do a procurement conference. At first I was just going to do it with September 11th businesses, but it is like a fire: Everybody wants to come because everybody wants to have the opportunity to build on Government contracts and to know how to do it.

I thank you for doing that, but it shows that people want access. I think if you have a system that is dependent on a political appointee, it will undermine the confidence of the American people in our contracting process.

I feel so strongly about it, because in New York City we let a contract for hundreds of millions of dollars on technology that didn't exist, on a program that didn't exist, and gave it to a company that opened up a bank account the day before with $25 in it. The way that happened is that there was a political appointee making the contracting decisions.

We changed that. We now have Chief Acquisition Officers who are professionals, who are trained, who have access, and who make independent decisions for the benefit of the city of New York and city of New York taxpayers to just get the best product at the lowest price.

I feel this is a terrible example of cronyism. I am adamantly opposed to it, Mr. Chairman, and we must get this provision changed in the bill.

Very briefly, I am very concerned about transparency. From my first glance in the 68-page thing, transparency is smudged in it. One of the chief tenets and values and principles of contracting has been that it be transparent and that it go to the lowest competitive, competent bidder. That is removed in this bill, and I find it very troubling.

My time has expired. Thank you.

Chairman TOM DAVIS. Thank you. I was going to bring, for our procurement conference, I was going to bring some political appointees up to New York. Can I do that, do you think? [Laughter.]

Mrs. MALONEY. No, I am not going to bring political appointees. I am going to have businesses there that want to learn how to bid on Government contracts. They will not even bid on Government contracts if they believe a political appointee is making that deci-

sion. They will feel that the way to get the contract is to make a contribution to a political party or somebody else, and that is wrong, instead of the merits of the product that they are putting before the Federal Government.

Chairman TOM DAVIS. Thank you. Well, for the record, the Chief Acquisition Officer has no contracting warrants, does not have any authority to contract anything. They are a policy person. The theory here is to have someone that will have the ear of the head of the agency, as opposed to someone who is down there that can write memos that never make it to the top.

But I will be happy to work with the gentlelady on this issue. I think we understand the concerns, but, again, the Chief Acquisition Officer has no contracting authority to give a contract to anybody. So I hope that will assuage some of her thoughts, but I would be happy to work with the lady. I appreciate her expressing her thoughts on this.

Mr. Turner.

Mr. TURNER. I don't have any questions. Thank you.

Chairman TOM DAVIS. Let me see, Mr. Ruppersberger is next.

Mr. RUPPERSBERGER. Yes, thank you, Mr. Chairman.

A couple of things, the specific areas that are contract term, share-in-savings, if we have time, the government-industry exchange program. What we are trying to do is to find the best system. It is all about accountability and performance in the end. We have learned from mistakes, and we need to learn from mistakes, and then move forward.

As far as contract term is concerned, section 302 would authorize agencies to extend the contract performance period for service contracts by one or more periods. There are no numerical limits on the number of such extensions. In effect, this would make for a potentially unlimited contract which really would permit service contracts to have options for an unlimited number of extensions, each for a period of unlimited duration. That is an issue I think we need to address.

In addition, the DOD Inspector General has commented, "The periodic expiration of a service contract should provide an occasion to spur competition and permit the Government to obtain a better deal or better technology than offered by the incumbent."

Now, I guess, Ms. Styles, the Competition in Contracting Act requires full and open competition, correct?

Ms. STYLES. Yes, that is right.

Mr. RUPPERSBERGER. OK. Now at the end of a contract performance period—generally, it is about 5 to 7 years—the contract is recompeted. Now do you agree that this is important to recompete contracts, and how long, if you do agree, should they be recompeted?

Ms. STYLES. Our current regulations, with the exception of information technology, require recompetition every 3 to 5 years. Generally, recompetition is very important for receiving lower prices, making sure we get the best quality, but you also want some flexibility in there to be able to reward a contractor that is clearly meeting your expectations at a low cost.

So, you know, award-term contracting is actually allowed under the current FAR. In many respects, this is a codification of what is currently allowed.

Do we need to make sure that we are firm on recompetition in a certain period of time? I think so, but it is also good to incentivize our contractors as well.

Mr. RUPPERSBERGER. Well, my concern is there are no numerical limits on the number of such extensions. I think that is a concern. You know, I would think you would have an advantage if you have the contract and you are doing a good job. But if you are not, then you need to recompete, and that gives incentives to do the job. I am concerned with that section. That is one issue.

The other, share-in-savings, the bill would authorize a contract type called "share-in-savings," where the contractor agrees to bear the initial project cost, including capital outlays, until the client agency begins to achieve specified results from the work, and the payment is based on percentage of the savings realized by the agency.

Now, at first look, I think that this is out of the box, and I am not in favor of going out of the box. I think that when we are trying to move ahead and be innovative, it is something that I think we should do. As a result, I think, of this type of program, which really puts a lot of the money and burden on the contractor, not the Government.

I understand, after some negotiation, that there were about 15 pilot programs that are under this program right now, but that these 15 programs have not really been analyzed yet, and the results have not come back to make sure this is where we want to go. Yet, this bill really opens the door for that.

I think there is one, and I am not sure, and I went to visit Ft. Mead, and that is Government housing for your military, where the contractor puts the money up, and it seems to me to be extremely innovative. But the issue there is this contract goes way out. It could go 50 years out. Anytime you have something like that and you don't have accountability, an accountability of performance, I have some concerns. Do you have any comments, panel, on that share-in-savings provisions of the bill?

Mr. WOODS. Well, if I could——

Mr. RUPPERSBERGER. Yes, anybody on the panel.

Mr. WOODS [continuing]. Step out on this one, you are absolutely right; accountability is extremely important, and particularly as the contracts extend out in terms of years. You need to have periodic performance measures. You need to have people in place on the Government side to make sure that the contractor is delivering on what it promised to do.

It is not enough just to award a share-in-savings contract or any other type of contract, for that matter, and then sit back and hope that you are going to get what you paid for. You need to have very serious surveillance plans in place.

Mr. RUPPERSBERGER. And that is my concern about this bill, that some of that is lacking.

Finally, because I see the middle light and it is not how long you take to answer questions sometimes, but the Government-industry exchange program, again, something that I think, if it works the

right way, but it could be certain people could say that it is basically the fox guarding the hen house sometimes.

My concern really is not about that, if you have the checks and balances, but it is about losing qualified, good people. We have a lot of people that would go into the Government exchange program, and we might lose our Government employees. They are going to go to the private sector.

We train them. We develop their expertise, and then they are gone as a result of that program. Are there any checks and balances that you know of that we could use to make sure that we protect our resources, that they don't go to the other side for more money—when I say, "the other side," to go to private industry? Any comments on that? Anybody?

Mr. WOODS. Well, again, not having seen the provisions of the bill——

Mr. RUPPERSBERGER. And that is why I bring it up.

Mr. WOODS [continuing]. There could easily be requirements, either in the statute or implementing regulations, that would require the parties to come back for a certain period of time, essentially, to enter into a contract with their agency that says, "yes, I will go to the private sector for a period of time, but I will agree to come back."

Chairman TOM DAVIS. Thank you. The gentleman's time has expired.

Let me just make one comment. The key factor here is, if we have a cadre of trained professional buyers for the Government that are close to the customer, understand what the customer wants, that we give them discretion. They are trained. It will be transparent. They are going to have to substantiate it, but better that than having everything driven by the same set of central regulations that basically handicaps them when you have a good performer where you have to make a change and the like.

You know, if there is a theory behind it, it is that we think that is where the savings are. It is not fraud and abuse, but it is waste.

Mr. RUPPERSBERGER. I don't object to the program. I am just saying the checks and balances to make sure that we don't——

Chairman TOM DAVIS. That is fine, and I think, as we work through this, we are going to be interested in comments from committee members. It is a work-in-progress. This isn't a take-it-or-leave-it proposition. I understand the concerns being raised, and that is why we are having a panel of a lot of different opinions as we come into it.

But the fact of the matter is that we waste billions of dollars annually in contracting that we are taking from our taxpayers that don't need to be wasted, that we could be a lot more efficient about doing this, and we are looking at ways to do that. We have a panel of experts. On our next panel I think they are going to be talking about their experiences in this.

I am not sure everybody has the right idea for the best way to correct it, but we have heard from Ms. Styles and others talking about some of the systematic problems in the current system that are costing taxpayers billions annually. That is what we are trying to get. I appreciate the gentleman's comments.

Mr. RUPPERSBERGER. One other thing, Mr. Chairman, if I could just raise this issue: Basically, it seemed to me that at one time it was strictly a bidding on the contract and the lowest bidder. In my opinion, that has caused so much inefficiency——

Chairman TOM DAVIS. Correct.

Mr. RUPPERSBERGER [continuing]. Inferior product, inferior performance, and that is why we need different programs and to move forward in those programs. So I understand that. I assume that we have come a long way since that time.

Chairman TOM DAVIS. We have, and we are trying to go a little further. If the gentleman would be happy to sit with some of our staff and Mr. Waxman's staff so he can ask questions, whether you want to get comfortable with provisions or maybe some additional amendments you would like to offer, but I appreciate it.

Ms. Watson, thanks for being here.

Ms. WATSON. Thank you so much, Mr. Chairman, and thank you for the opportunity to have the comment from the General Accounting Office.

I want to thank the GAO for raising the concerns, but I find you very timid. I do know we are working in an atmosphere where you are gagged in many ways if you are critical of what is going on. That is very disturbing to me in a democracy.

I have seen things occur in the last few months that are appalling. I was startled when I found that the deal was already done and Halliburton received a contract without competition. In a democratic society, should that ever occur?

At a time when we have a budget that is proposing a tax cut that limits the revenues, at a time when States are hurting, particularly mine with 35 million people, California, with a $35 billion deficit, with tens of thousands of people out of work, we have to watch every single penny. To give a contract without competition to a firm that we know has been connected to someone in this administration I think fits the definition of abuse.

Now thank God for the GAO. You are supposed to raise these concerns. Without any connection to partisan, you raise the issues. I am just pleased that you have gone as far as you have. I don't think you are strong enough, though.

What I am really concerned about, if these little in-house deals are going to be made, and this proposed bill, as I understand, you have not seen the provisions, am I correct? Just nod your head. Have you seen the provisions?

Mr. WOODS. We have all seen a detailed, section-by-section analysis, I believe, but——

Ms. WATSON. But have you seen the bill itself?

Mr. WOODS. The bill was just introduced yesterday, and I certainly have not had——

Ms. WATSON. Of course, and neither have we. So we work in the blind. I find it very troubling here in Congress working in the blind. You never see the actual wording of the bill, and, you know, a bill is law. Any word in that can be taken to court for a definition. So, you know, we are operating, Mr. Chairman, in the blind. We should have not the analysis, but the bill in front of us, so that we could really have direct and relevant comment.

But, anyway, it raises great concerns to me, representing an area, a large urban area in Los Angeles that is suffering because of lack of jobs. I want any one of you that is willing to comment to let me know, if you know if this legislation includes any protections to ensure that small businesses, minority businesses, women-owned businesses have a realistic chance to participate in the Federal procurement process as a prime contractor.

Small businesses are the fuel that runs the engine of our economy. From what I am seeing, we can expand language and definitions and put our friends in, and small businesses, minority businesses, women-owned businesses don't even try. This is what I am gathering from this.

Some of the streamlining incentives and procedures I think end up excluding, because, you know, we can do it real quick. So I would like you to comment.

The other thing, too, and this goes to Ms. Styles, do you see the need to start training these "little people," as you described like that, these "little people," and do you see a way, can you suggest to us or recommend to us a way to give them a broader specter of what is going on from the administration on down? Are we to say that the political appointment is the only way to go here or can we make professionals out of our staff? Or can we have someone employed in this position that is not connected up to the administration?

I mean I am trying to find a way around this. What would you suggest?

Ms. STYLES. I think there is a lot that can and should be done to train our people in small business requirements and what small business brings to the table in terms of innovation, creativity, and lower cost. We have taken some steps to encourage agencies to reallocate resources to their Offices of Small and Disadvantaged Businesses, which actually include both political and career appointees that report to the heads of their agencies.

We also think, I personally think that we have a negative culture toward small business within the Federal Government that has developed because we have a very confusing set of laws on the books in the small business arena. We have very confusing judicial interpretations. We have very confusing regulations. And we can train and train and train our Contracting Officers, and they may still not be able to understand whether they should prioritize a woman-owned business, an 8(a), an SDB, a HUB Zone, a service-disabled veteran, or a veteran-owned small business, because it is very difficult to interpret and understand.

So I think that there is a lot that we can do, whether it is training, whether it is streamlining, whether it is simplifying a small business' entrance into the system or simplifying it from the perspective of a Contracting Officer, that they can check off one box or SBA can check off one box and know for all procurements that business is a small business, not just for this procurement and this NAICS or SIC code or this industry; that this person is small for all purposes, and that there is something that they can be reassured that there is some accountability, that it really is small and there is no question about whether it is an accurate certification or not.

So I think that there is a lot that we can do, that we have been pushing to do, within the administration, particularly through the SBA, and I would say focusing in our Offices of Small and Disadvantaged Businesses within the agencies to really pursue opportunities for small businesses within their agencies.

Chairman TOM DAVIS. Thank you. The gentlelady's time has expired.

Let me just add one thing. We would be happy to work with you on some clarification of this. I think by expanding the definition of commercial entity, that opens it up to a lot of small businesses that right now are reluctant to change their accounting systems and deal with the Federal Government. But if the gentlelady will work with us, maybe we can put some language in there that could improve this.

Ms. WATSON. Mr. Chairman, may I ask you a question?

Chairman TOM DAVIS. We have a vote in 5 minutes, and I want to try to get through all the questions before——

Ms. WATSON. OK. Just an ending question. It says that GAO is not making recommendations. I am wondering if you could make some recommendations and send them to the committee?

Chairman TOM DAVIS. I have asked them to try to do that. That would be fine.

Ms. WATSON. Thank you. Thank you very much for your indulgence, Mr. Chairman.

Chairman TOM DAVIS. Thank you.

Mr. Davis.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman. It seems as though whenever I sit next to the gentlewoman from California, her thought processes kind of rub off on me. [Laughter.]

And, plus, I just left some activity dealing with small business.

How do we really get small businesses more actively involved, if we have a policy that promotes contract bundling, which I think in many instances raises the bar beyond the ability of small businesses to participate? Do you have any——

Ms. STYLES. We don't have a policy that promotes contract bundling. We have been actively, at the suggestion of the President, pursuing efforts to unbundle contracts. We came out with recommendations in November, at his request. He asked my office to come up with recommendations to unbundle Federal contracts.

We have a nine-point action plan that the General Accounting Office has looked at and believes is a good plan for moving forward. We introduced regulations on January 31st to address problems. We had a 60-day review period, and we are requiring quarterly reports on agencies for their efforts to unbundle contracts.

Mr. DAVIS OF ILLINOIS. So we have been active? This is relatively new and current?

Ms. STYLES. Absolutely.

Mr. DAVIS OF ILLINOIS. Because the records that we have been reviewing have indicated that most Government agencies are doing very poorly even itself with small businesses, in contracting with small businesses, or finding ways for small businesses.

I know the ones that I interact with catch holy Hell trying to get some business, and they maintain that the processes do not really help them, but pretty much shut them out. So I am pleased to

know that we are moving in a different direction, and we will look forward to the kind of progress that we make.

Mr. PERRY. Mr. Congressman, if I can answer that, add to that answer, at GSA, while the congressional requirement for the portion of business done with small businesses is 23 percent, we at the end of last year were able to achieve 40 percent. Under this directive, we are striving to make it higher.

So unbundling is one of the aspects. But even in cases of contracts which are bundled or remained bundled, it is with special emphasis on small businesses being included.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman.

Chairman TOM DAVIS. Thank you very much.

The bells are going off for a vote. Mr. Cooper has not had an opportunity yet. We will conclude with your questions and you can stop, and then I will dismiss this panel. We will recess for 15 minutes and come back and do the next panel.

Again, thank you for being here.

Mr. Cooper.

Mr. COOPER. I thank the Chair and I will try to be brief.

On the next panel, Professor Tiefer will be testifying. If it is according to his written testimony, he makes several claims here. One is that the bill is much broader than the title would suggest. He says that “its diverse provisions outrun the stated general justifications for relaxing procurement safeguards.” It is hard to accurately title a bill, but, still, I think that should raise concern to Members, that we know the broad reach of the legislation.

Second, and much more alarming, he says, “The rationale of giving out incentives to favored contractors without alternative disciplines for procurement risks just produces a Christmas tree of procurement giveaways.” I don’t think anybody on this panel on either side of the aisle is interested in legislation that could backfire to that extent.

I see the chairman looking with some amusement. I assume that you——

Chairman TOM DAVIS. Well, the gentleman has opposed every reform measure that has come down through here. So he wants to go backward, not forward, but we will get them in the next panel.

Mr. COOPER. We will let the gentleman speak for himself.

It is particularly alarming because I am a business Democrat, and I think competition built America. This gentleman is claiming that under this legislation formal competition to provide Government services could become an endangered species.

He is particularly worried that, when you couple this legislation with the new and revised version of A–76, that it will have a tendency, “of the new A–76 toward contracting out for contractor’s sake rather than for the public interest. Provisions like this could extend contract terms to create contractors for life.”

Surely, that would be an unintended consequence of this legislation, but contractors are hardy folks, and if there is a way for them to get a contract for life, that is a pretty good deal.

I would like to ask this panel, have you looked at the downside of this legislation sufficiently—and I know you haven’t been given a detailed copy of it—so that you could comment on the professor’s concerns here? Because if true, these are pretty serious allegations.

Ms. STYLES. I certainly, from my review of what I have seen so far, don't see how you would be creating a contract for life for anyone. I think, you know, we will all——

Mr. COOPER. Should there be a numerical limit on contract extensions?

Ms. STYLES. We have them in regulation right now. Quite frankly, the award-term provisions in my understanding of them, and I don't have the text in front of me, is that it codifies existing flexibilities. So I think the dangers may be overrated.

Mr. COOPER. It is my understanding there are not any numerical limits on contract extensions, and already many billions of contracts are not competed out. Whether it is Halliburton or somebody else, I think that should raise red flags, shouldn't it? The American way is competition, healthy and hardy competition.

Ms. STYLES. Absolutely, and I think that we should always be promoting competition, but you also have to recognize that at times——

Mr. COOPER. Except for Halliburton.

Ms. STYLES [continuing]. We are going to be able to get a better value for the taxpayer if we award good-performing contractors at a low cost for what they are doing, just like the private sector does. So I think we have to have some flexibility here.

Mr. COOPER. Flexibility with competition in as many cases as possible?

Ms. STYLES. Absolutely, absolutely. Absolutely.

Mr. COOPER. Any other panelists have a comment?

Mr. PERRY. Well, I would just add that I think in all of these cases we will have to put some emphasis on having processes or procedures that are correct and that are appropriate, but also some of what we are discussing is good execution. In other words, if we don't have good execution, we can have a very limiting or very open process, and without good execution, it doesn't work.

I think some of the challenges that we will face in making all this successful is to focus on good execution and not try to make the process so proscriptive, such that we eliminate all the flexibility, but at the same time manage that flexibility with good execution. I think some of our difficulties will be resolved by good execution.

Mr. WOODS. If I could just add a couple of points?

Mr. COOPER. Yes, please.

Mr. WOODS. One is on the competition issue that you raised. I would refer you to our report that analyzes the extent of competition at the 10 major agencies.

But, second, what we are trying to achieve across the board with a number of these provisions and other initiatives is to try to come up with incentives for good contract performance.

Chairman TOM DAVIS. Could the gentleman speak into the mic?

Mr. WOODS. Oh, I'm sorry.

Chairman TOM DAVIS. It is hard to hear you.

Mr. WOODS. We are trying to come up with incentives for solid contract performance across the board in order to enhance the value that the taxpayer gets for contract dollars. There is a number of ways to do that, and two are on the table right now. Periodic competition is certainly a good way to enhance contractor perform-

ance. But another way perhaps would be to provide the possibility for award-term contracts for good performance. That is what I think this bill is trying to accomplish.

Chairman TOM DAVIS. Let me thank the gentleman for his questions. Let me also refer you to the testimony of Dr. Kelman, who is a Harvard professor——

Mr. COOPER. I read that, too.

Chairman TOM DAVIS [continuing]. And the Clinton administration's procurement czar, who is at Harvard today and could not be down here. He takes a somewhat different view as well.

There are a lot of views in here. We try to hear from everybody and then put it together. I appreciate a lot of the comments that Members are making, and, of course, we will take this into account as we go into markup.

So we have a vote on the floor right now and——

Mr. WAXMAN. Mr. Chairman.

Chairman TOM DAVIS. Yes?

Mr. WAXMAN. Before we break——

Chairman TOM DAVIS. Yes, Mr. Waxman.

Mr. WAXMAN. I know Ms. Styles said that the administration hasn't had an opportunity to offer proposed changes, but now that there is actually a bill that has been introduced within the last 24 hours, you will have a chance to do that, and maybe the other two members of the panel——

Chairman TOM DAVIS. I invite all the panel members to address the specifics.

Mr. WAXMAN. Yes, the problem we have, of course, is that we originally were going to go to a markup tomorrow, which is a very short period of time. I think we may have a little bit more time than that, but I would request that we get some further input from the three of you, now that you can look at the details of the legislation, not simply a summary or a discussion with the staff, so that we can have the full benefit of your input.

Chairman TOM DAVIS. Thank you. Let me just add, 90 percent of this bill everybody has seen before and we have held hearings on, and I think they can address that in short order, so you can have their comments, and I appreciate it.

Let me say to the panel, thank you very much for being with us. I think this has been very, very helpful. I will dismiss you at this point.

I will recess the meeting. We will come back for our next panel in about 15 minutes. Thank you.

[Recess.]

Chairman TOM DAVIS. Thank you all for bearing with us.

We have on this panel Professor Charles Tiefer of the University of Baltimore; Bruce Leinster, chairman of the Information Technology Association of America's Procurement Policy Committee; Mark Wagner, vice president of Government Affairs, Johnson Controls, testifying on behalf of the Contract Services Association, and Ted Legasey, the executive VP/chief operating officer of SRA International, a northern Virginia company.

It is the policy of this committee that we swear all witnesses in. So if you would rise with me?

[Witnesses sworn.]

Chairman TOM DAVIS. Thank you.

Why don't you start, Professor Tiefer? We will start with you and move right on down.

Again, the rules are 5 minutes. We have your total statement in the record. You can see Members have read this. When it turns orange, you have a minute to sum up. When it is red, your time is up. Thank you very much.

STATEMENTS OF CHARLES TIEFER, PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE; BRUCE LEINSTER, CHAIRMAN, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA'S PROCUREMENT POLICY COMMITTEE, TESTIFYING ON BEHALF OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; MARK F. WAGNER, VICE PRESIDENT OF GOVERNMENT AFFAIRS, JOHNSON CONTROLS, TESTIFYING ON BEHALF OF THE CONTRACT SERVICES ADMINISTRATION; AND EDWARD E. LEGASEY, EXECUTIVE VICE PRESIDENT AND CHIEF EXECUTIVE OFFICER, SRA INTERNATIONAL, TESTIFYING ON BEHALF OF THE PROFESSIONAL SERVICES COUNCIL

Mr. TIEFER. Thank you, Mr. Chairman. I am professor of government contracts at the University of Baltimore Law School.

My overall view of the statute, of the proposed SARA bill, is that in a situation we have now, where out of the total of procurement $123 billion is not being competed fully each year and one-third of the total procurement is being sole-sourced, we need to be cautious about a series of provisions that are primarily incentives. They are not primarily provisions in this bill which have an alternative discipline which say we can relax competition because we have some other discipline that will take its place. We have gone in this bill far in the direction of having incentives without disciplines.

Actually, rather than adhere to the format of my written testimony, I was struck by the number of points on which the administration and myself have the same criticisms of these provisions. I will just go through several of those items in the bill because the administration has a way of speaking less than expressly, even though their point is quite clear.

With respect to the share-in-savings provision, section 301, I read the administration's testimony as that they are opposed to any expansions of share-in-savings authority, the reason being that the Congress just gave a hefty proposed SIS provision for information technology. We have had no chance to see how it is going to go. Why rush ahead with a provision that basically authorizes backdoor spending until we have seen it? So the administration is critical; I join them.

With respect to section 502, the so-called emergency flexibility provisions, which were permanent for the Department of Homeland Security, but which are only 1 year in duration under current law, the administration, Ms. Styles said that they should remain subject to an appropriate sunset date. They have a 1-year sunset under current law. The proposal in the SARA legislation is to make them permanent, and I agree with the administration; they should remain subject to an appropriate sunset date.

The danger is that you would be surprised at how much comes under the very loose statements of what that could cover, since it is governmentwide. I see no reason that Halliburton's contract could not come under that because Halliburton is part of a response to an Iraq situation, which could fit under the definition of 502. So we could have a complete relaxation of all procurement safeguards, which is the way 502 works, permanently, wherever they can be dragged under a very broad definition throughout the Government.

Section 404, the commercial entities provision, the administration's objection is that they are, "unable to find any meaningful protections for the taxpayer," in this, the reason being that if you have an entity that sells, like General Electric, light bulbs commercially, but then sells items that are utterly uncommercial, that are defense-only, that are sole-sourced, if they can fit under 404, they get to walk away from all the restrictions that the Government puts in as safeguards.

To speak promptly about the last pair of provisions, section 404, which says that commercial treatment can be given to contracts as long as they are in performance-based terms, this has no dollar ceiling on it. This can be a billion-dollar services contract which aims the requirement that it be sold and it applies even if the materials are not sold widely in the commercial market. This, too, is something that cost-type contracts are not clearly excluded from this, as they should be.

And, last, with respect to section 402, the time-and-materials provisions, I see no reason why—this is where the administration pointed out that the DOD IG has found a sevenfold cost overrun under such contracts. I see no reason why Bechtel couldn't change its fixed-price construction contracts to become time-and-materials under this provision.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Tiefer follows:]

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TESTIMONY BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT REFORM

by Professor Charles Tiefer

ANALYZING THE PROPOSED SERVICES ACQUISITION REFORM ACT

Thank you for the opportunity to testify on the reoffered AServices Acquisition Reform Act.≅ I am Professor of Government Contracts at the University of Baltimore Law School and the author of GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (Carolina Academic Press 1999 & annual supplements)(co-authored with William A. Shook).

OUTLINE OF TESTIMONY
Overall
Section-by-Section
Amendments

OVERALL
<u>The Best and Worst Changes in SARA</u>

Let us start with praise about a major change in the SARA version from the last Congress. Hitherto, it had a special thrust: sections 602 and 603 to prohibit flow-down of Service Contract Act (SCA) and Davis-Bacon Act (DBA) requirements to certain subcontractors. I suggested in my last SARA testimony that repeals of SCA and DBA were Adeal-killers≅ because their inclusion gave the whole bill an anti-labor reputation. Omission, in this Congress, of these provisions lifts SARA out of those particularly polarizing controversies. Chairman

Davis deserves praise for dropping those. I appreciated the courtesy shown by the Chairman and Ranking Minority Member inviting me to testify and hope that what I say, although often critical of specific provisions, will be of value.

SARA, as a whole, raises concerns because many of its diverse provisions outrun the stated general justifications for relaxing procurement safeguards. In other words, while proponents of SARA still repeat as slogans the rationales given in the past decade for "acquisition reform," SARA's actual provisions do not supply alternative disciplines when creating loopholes in full competition and procurement safeguards. The new rationale, of giving out "incentives" to favored contractors without alternative disciplines, risks just producing a Christmas tree of procurement giveaways.

To spell this out: Congress reformed the procurement system in the 1980s, in the wake of major scandals about non-competitive (often sole-source) and wasteful procurement. Congress required formal Afull and open≅ competition in the Competition in Contracting Act (CICA). And, Congress strengthened the other safeguards against waste, fraud, and abuse, such as pricing disclosure under the Truth in Negotiations Act (TINA), accounting consistency under the Cost Accounting Standards (CAS), and the other safeguards throughout the Federal Acquisition Regulation (FAR).

Classic "acquisition reform" in FASA in 1994 and FARA in 1996 relaxed those requirements of formal competition and safeguards – selectively. FASA and FARA proponents risked doing so – selectively - even without the discipline of a fully functioning private market in commercial items under the traditional definitions. They relaxed those safeguards by relying upon the presence of the alternative discipline - some private market analogue or some commercial item characteristics, or the small scale of purchases under a low threshold, to justify letting go of formal competition and safeguards. I discussed this direction in *Congress and Commercial Procurement*, 32 Procurement Lawyer, Spring 1997, at 22 (co-authored with Ron Stroman, former committee counsel).

SARA's diverse provisions depart in a wholly new direction, even though its proponents still give lip service to the previous rationales for acquisition reform. Many SARA provisions allow an ending of formal competition and/or the relaxing of safeguards simply as Aincentives≅ for procurement. Some do not even have dollar ceilings as fall-back limits on the scale of government exposure to abuses.

Such further reduction of formal competition deserves careful scrutiny. The Associated Press reported (4/1/2002) that, of $230 billion in federal contracts, $123 billion, or more than half, were awarded without full competition. Indeed, a third, or 34 percent, were awarded with no bids at all. These are very serious figures. They confirm the findings of inspectors general, the General Accounting Office, and other reliable institutions. Push this too much further by the least justified provisions in SARA, and formal competition becomes an endangered species. AHappy talk≅ by industry trade associations about how there is more competition than ever, rings hollow. The press and the public rightly believe their own eyes instead.

Hence, further loopholes in CICA, TINA, CAS, and other competition requirements and safeguards, particularly in the absence of alternative disciplines, exacerbate existing problems reported by the Project on Government Oversight, *Pick Pocketing the Taxpayer: The Insidious*

Effects of Acquisition Reform (2002) and by Professor Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (2001).

Undigested New Policies

Also, there is particular reason for caution in recent undigested new policies on the subject areas of SARA. For one, on top of FASA and FARA, Congress in 2002 created the Homeland Security Department, and passed the Ae-government≅ act, both of which moved the government quite far along in procurement innovations relaxing competition requirements and traditional safeguards. At best, these new policies have not had time for testing, checking, and refining. For example, the Share-in-Savings provision of the E-Government Act provides for a GAO report after six months. Surely the lessons in that report should be learned before further steps are taken.

Moreover, the subject of services also has a central place in the new version of OMB A-76, proposed in November 2002, approaching finalization soon, which will change the system for public-private competitions. The risk exists for an unhealthy combined effect by the experiments of SARA to forego formal competition and the experiments of OMB A-76 to forego traditional safeguards in public-private competition. Provisions like "Share-in-Savings," or the revolving door of "government-business exchanges," could augment the tendency of the new A-76 toward contracting-out for the contractors' sake rather than only for the public interest. Provisions like extending contract terms to create "contractors-for-life" would then get in the way of what new A-76 ostensibly offers, to let public employees compete for work at the expiration of private contracts.

Imagine dismantling the IRS, the Social Security Administration, and the Federal Prison System under the combination of new A-76 and SARA, and the picture is the opposite of reassuring . As a result of the combination of new A-76 and SARA, the government could informally, and without full competition, make the decision to shut down superior in-house operations without competition, dismantle irretrievably its proven work force, and expose itself to mission failure, waste and abuses. The same upcoming issue of the newsletter of the Federal Bar Association=s Government Contracts Section which includes a piece about SARA, also includes an article of mine about problems in the new A-76. That piece is incorporated herein by reference.

Potential Controversies – Halliburton, Bechtel

Some may wonder whether there is that much potential to embarrass the Congress or the agencies by these seemingly technical and obscure SARA departures from formal competition and safeguards. In the services context, recently a particularly dramatic example of sole-source awarding came with the Defense Department contract to Halliburton for services in Iraq, followed by less-than-full-competition by the Agency for International Department for Iraq postwar reconstruction such as in the large contract to Bechtel. Without getting into the detailed arguments, at a minimum, these controversies - some respected editorial pages have used stronger terms to describe these than mere controversies - show how exemptions from full and open competition operate even under existing law.

Some provisions of SARA would open the door specifically for contracts like

Halliburton's and Bechtel's with more controversies even than just occurred. The public=s confidence in the procurement system once it moves away from full competition, and other safeguards, turns out to be limited and fragile. It makes more sense for Congress to bolster that confidence than to strain it further. If anything, the corporate accounting scandals of the last year from Enron on – involving government contractors and payees from Halliburton to Worldcom to HealthSouth - should suggest caution about "incentive" provisions in SARA which put blind faith in the public-spiritedness of contractor accounting.

Broad Scope for Amendments

A last overall point: With this year's changes, the overwhelming majority of SARA's diverse provisions do not concern services specifically. It is noteworthy that, unlike Title IV's title in last year's version, which referred to "Services," this year, the use of the term "Items" in the title frankly concedes that provisions have to do with "incentives" to providers of everything, not just services. And Titles V as to "Other Items," also are for non-services providers.

At least in the last Congress, the provisions to partially repeal the SCA and DBA, although controversial (and wisely omitted now) did focus upon services. In this Congress, only a handful of provisions even arguably just concern services. Quietly, the ambitions behind the bill have become universal as to all procurement, not just services. I suppose bills that start at full committee, rather than subcommittee, tend to express such larger ambitions.

What are the legislative implications of the bill now ambitiously dealing with all procurement and no longer being focused just upon services? For one thing, it means the widest scope of germaneness for amendments about procurement, no longer facing the argument that unless the amendments concern services, they fail to relate to the bill's subject. An elementary rule of germaneness, is that to a bill containing several propositions, an amendment that would add another of the same class is germane. (See Charles Tiefer, Congressional Practice and Procedure, at 435 (1989)(citing House Manual section 798g.).)

SARA's diverse propositions, no longer limited to services, afford every reason to consider, as germane, provisions for amendments dealing with other aspects of procurement not limited to services. You might simply ask the Parliamentarian whether this is a narrowly focused "services" bill any more: he will tell you that having the word "Services" in the bill's title alone does not significantly narrow the scope of germane amendments, and having a major subtitle be a grab-bag called rightly just "Other Matters" confirms the scope is not narrow.

So, just to recall a few of the recent procurement issues in the news, properly drafted amendments might appropriately be offered to address:

arbitrary quotas for contracting-out;

procurement from expatriate companies;

lack of sunshine in Iraq reconstruction contracts;

My testimony points out various provisions that logically invite amendments of these kinds, and, has a section at the end on this subject

Section-by-Section: SARA=s Titles

The comments here will be organized title-by-title by the proposals in the draft for the Services Acquisition Reform Act (SARA).

Titles I and II – Workforce and Training, and, Business Practices

A section creates a fund, handled outside the appropriations system by the Federal Acquisition Institute (FAI), for training. No doubt proponents of this provision will quote selectively from the GAO report for this Committee, "Agencies Can Improve Training on New Initiatives," January 2003.

The Federal Acquisition Institute seems to have other interests in mind than teaching procurement officials to be zealous about fostering formal competition and about being strict about the rules against waste, fraud, and abuse. If the committee is facing a debate with appropriators about end-running the appropriations system, it would do better if some of the training funds were earmarked for fighting for competition and against waste, fraud, and abuse.

Another section creates a kind of revolving door program for swapping "acquisition professionals" temporarily between public and private sector posts. This provision seems fraught with conflict of interest potentials. It would bring persons whose obvious loyalties tie them to their permanent private employer, very temporarily into public sector acquisition posts. There they have access both to sensitive inside information and, more generally, every reason to scope out questionable courses of action, such as how to advantage their permanent private employer in a play to contract out the work they see while inside. Conversely, it would give public officials an opportunity to scope out post-employment opportunities that would compromise their loyalties when they return to the public sector. The potential for conflicts in this provision are familiar from the Procurement Integrity Act (PIA). Making the private detailees into temporary public "employees" for the applicability of the PIA and other statutes hardly mitigates the conflict; they do not have to be crooked, to put the interest of their permanent private employer first and the public interest second. This provision combines unhealthily with the new A-76.

A section would establish an advisory panel to review laws and regulations that Ahinder≅ the use of commercial practices and other matters, which would report in a year. Many aspects of this section are discouraging. First, the panel=s mandate lacks even a pretense of awaiting the evidence before deciding the direction. The panel cannot consider, apparently, the respects in which problems with the already-introduced practices of those kinds require addressing, such as, as the AP reported, sole-source awards have already risen to a third of the total.

Second, saying the panel membership should reflect Adiverse experience in the public and private sectors≅ creates the illusion but not the reality of true balance. No mention occurs of public employee labor organizations, a key perspective. No mention occurs of other voices that balance the self-interest of contractor trade associations: the voices of the government=s own experts on waste such as inspectors general; the government=s experts on procurement law and policy in the government=s internal academies such as the Judge Advocate General School and the Defense Acquisition University; private academics of diverse persuasions such as those in the George Washington University program on government contracting; public interest groups of diverse persuasions; and, all labor organizations, private and public alike. ADiverse experience in the public and private sectors≅ portends a heavy predominance, if not a unanimous front, of

figures currently working for or with the contractor trade associations, simply possessing past government experience. Unbalanced, biased panels just portend future trade association wish lists with a government imprimatur.

I also note that in making appointments, the Administrator of OFPP is to consult with Congressional committees, but need not particularly consult with the minority. SARA should not ignore the lessons from the period when Democrats were in the majority, when the obtaining of balance by inclusion of such distinguished minority members as William Cohen and Frank Horton - real choices of the then-minority party - brought breadth of perspective and true bipartisanship to the advisory panels.

Third, each revision of SARA seems to make the panel's mandate more and more like trade association wish lists. It now adds "the use of Governmentwide contracts" to what the panel should look to overcome hindrances. Such contracts (known as "GWACs") have become a principal vehicle for cutting back on full and open competition, and for reducing the availability of legal protests that ventilate violations of law and regulations.

Title III - Contract Incentives

Excessively Risky Share-in-Savings

Section 301 would dramatically expand AShare-in-Savings,≅ a new type of contracting with large risks for the government. Late in 2002, Congress already undertaook a large-scale experiment with AShare-in-Savings≅ for IT procurement, pursuant to section 210 of the E-Government Act of 2002, Pub. L. 107-347 (codified at 10 U.S.C. 2332 and 41 U.S.C. 317). In contrast to the E-Government provisions, SARA=s provision would authorize Ashare-in-savings≅ beyond information technology, to any kind of contracts. What this does is tear down the single rationale that justified the experiment in the E-Government Act. The rationale was that IT procurement offers a field of such unique and powerful opportunities for the government to catch up with fast-moving technological advance, to justify all the downsides of SIS. SARA=s provision completely lacks that rationale. Nothing would apparently prevent the providers of any services from abusive private debt collectors offering to replace the IRS, to sloppy private airport screeners offering to replace the TSA, from making sweetheart Share-in-Savings deals.

In 2002, I prepared a full-length critique of AShare-in-Savings,≅ available through the website of the Project on Government Oversight, which is incorporated here by reference. AShare-in-Savings≅ contracts are a form of long-term backdoor spending which locks the government into potentially sweetheart deals to particular favored contractors. It cuts out the appropriators and other overseers. It precludes the government from the often-superior alternative of making its own changes over time, either in how it does work in-house or in how it would contract-out the work.

Presumably proponents of SIS will mention a GAO study for this Committee, "Commercial Use of Share-in-Savings Contracting," January 2003. It looked at four commercial SIS contracts. One noteworthy finding of the GAO study was that one of the "key conditions

facilitat[ing] the development and execution of the SIS contracts . . . . SIS contracting is attractive to clients who (1) *do not have the funds for*, or choose not to pay, some or all of the up front costs of a needed project and (b) *are willing to pay the premium SIS contractors charge for putting some or all of their compensation at risk.*" Of course, the federal government is the last entity in the world that should choose to pay the premium charged by SIS contractors for effectively lending the government the up front costs of a project. If there is one single thing the federal government wastes money doing, it is borrowing through a back door from contractors paying a high interest rate, instead of raising funds itself through borrowing by the Treasury at a much lower interest rate.

So, even the GAO study simply underlines how wasteful it is for the government to enter SIS contracts and pay a premium to SIS contractors for them to conduct back-door borrowing for the government. Parenthetically, that GAO study sets a new record for narrow, tailored, slanted design of a study not to measure whether legislation actually serves a good purpose, but just meant to support a preconceived proposal. The GAO was told to look at, and looked at, four successful private SIS contracts. It proves only that there are four successful private SIS contracts. It says nothing about when SIS contracts would have merit in the public sector, let alone warrant wide-open launching, beyond what the E-Government Act did, by the provision suggested by SARA. Quite the contrary, in a slip from the script, the GAO study quotes that "according to GSA officials, federal agencies have difficulty in measuring baseline costs," meaning that an SIS contract will malfunction in the context of federal agencies because the essential starting point of well-measured baseline costs is absent.

<u>Entrenching Incumbents: Extended Contract Terms</u>

This could be called the "Contractor for Life" provision. The "Incentives for Contract Efficiency" section would let service contracts have options for extension by an unlimited number of periods, each of unlimited duration, awarded for Aexceptional performance.≅ Traditionally, CICA required full and open competition. At the end of a contract's performance period, when the agency could competitively compete the successor contract, renewal of the incumbent contractor without competition is simply an exacerbated form of behind-closed-doors, sole-source procurement. Nothing in this provision limits such extensions to contracts of any particular size, nor to contracts competed even the first time, nor is it clear how a potential competitor could protest. So, the section promotes: a system in which even giant contracts get initially sole-sourcing; and then, have no competition at the five, ten, fifteen, and twenty year mark, as the "Contractor-for-Life" steps up its own monopoly profits.

An agency that is short-handed as to acquisition personnel, captured by well-connected contractors using every tool to entrench themselves permanently, and not under any meaningful counter-pressure to fight for competition and change, may succumb simply to signing the paperwork to renew the contractor over and over. Having "performance-based" standards does not constrain the entrenchment much.

This is another of those provisions that combines in an unhealthy way with the new A-76. When the Administration justifies the new A-76, it espouses a theory that both public and private providers should periodically re-compete at the end of their contract, such as with an iron-clad five year time limit on public employees having the work. Service contractor trade

associations oppose the serious legislative proposals in Congress, like Rep. Wynn's bill to compel supervision of private contractors with an eye toward efficiently bringing private work back into the government, with the argument to let new A-76 take care of that. But, if SARA has provisions for unlimited extensions of the period of private service contracts, then those private contracts will not receive periodic competitions even as to other private bidders, let alone public-private competitions. Hence, the result becomes: new A-76 gives repeated opportunities every few years to terminate the public performance of the work without full formal public-private competitions; after the work goes even a single time to a private contractor, then this SARA provision lets the private contractor keep the work thereafter without any later competition.

In germaneness terms, this provision provides a natural example of why the bill can carry provisions like anti-contracting-out-quota amendments.

Title IV - Commercial Items

"Commercial Items" Without Market Discipline

Section 401 treats service contracts as a "commercial item" just by requesting it by performance-based specifications. That means foregoing full and open competition and a number of safeguards. The provision had no time limit and does not impose a dollar ceiling; any future billion-dollar service contract could get this treatment. (A stated $5 million ceiling only applies to the further relaxation, beyond commercial treatment, of simplified acquisition treatment.)

With no dollar ceiling at all, this becomes one of SARA's provisions that foregoes competition and safeguards on a potentially vast scale. Requiring that the source must provide "similar services to the general public" only puts in place a loose and inadequate safeguard, because this slack, vague phrase contrasts with the traditional much stricter terms for true private market discipline. For example, a contractor wanting to exploit this provision can just offer something "similar" to the public regardless of its being so overpriced or specialized that no one except the federal government buys it. Suppose a defense contractor selling warplanes, like United Technologies, wants a billion dollar contract, without competition or safeguards, at an inflated price, to service them. It need merely post, on its public offerings for civilian buyers, a "similar" service. Even if no one buys because of the inflated price, now it qualifies for this section 401 exemption.

The Federal Acquisition Regulation (FAR) already has provisions favoring performance-based contracting, in FAR Part 37. These were boosted by section 831 of the FY 2001 DOD Authorization (Pub. L. No. 106-398), through regulations published at 66 Fed. Reg. 22082 (May 2, 2001). There is a pilot program established by section 821 of the same act, which allows commercial item acquisition methods, within defined limits, by the DOD for performance-based contracting. That is enough. Going from a time-limited pilot program, with ceilings, to the wide-open opposite, is too much. Section 401 opens an unlimited loophole.

Deeming T&M and L-H Contracts to be Commercial-Type Contract Vehicles

This section deems time and material (T&M) and labor-hour (L-H) contracts amenable for commercial treatment, that is, exempt from full competition and safeguards. T&M and L-H

are like cost-reimbursement contracts in that the main risks - of how much the service will cost, which depends upon how much labor time and how much materials will be used - are carried by the government, not the contractor. For years, contractor trade associations have continued to push to obtain what the sensible compromises in FASA and FARA withheld. See Richard J. Wall & Christopher B. Pockney, *Contracting for Commercial Professional and Technical Services: The Federal Acquisition Streamlining Act=s Unfinished Business*, 76 BNA Fed. Cont. Rep. 76 (July 17, 2001). This provision gives it to them. The experience of Inspectors General with cost-inflation in T&M contracts has been disregarded. So has the holding by the GSBCA that "the time and materials order falls within the broad genre of cost-reimbursement type contracts. This type of contract places relatively little cost or performance risk on the contractor, in contrast to a fixed price contract . . . ." CACI, Inc-Federal v. GSA, GSBCA No. 15588 (Dec. 13, 2002).

Again, as with the previous section, there is no ceiling; this could be a billion-dollar contract. The standard here – that these be "commonly sold to the general public through such contracts" – although less slack than the previous section, is still quite slack in that it does not even require that there even be an established market rate for a task. More important, the T&M and L-H contract form puts the main cost and performance risks on the government, and a contractor can inflate the rate or the number of hours, or cut the quality, in the absence of competition and safeguards.

For example, suppose some construction contractors do some of their private work on a fixed-price basis, and some on a T&M basis. Will we be better off if billion-dollar run-of-the-mill construction work given by the government to Bechtel shifts from fixed-price, with competition holding down prices, to T&M, where, after contract award, the taxpayer's charge can rise without limit? Suppose contractors like Argenbright, which did a grossly low-quality job of airport screening until the 9/11 attacks, could now obtain a billion-dollar contract to perform protective services for the federal government on an L-H basis, without full competition or safeguards to constrain the performance risk. Contractors like Argenbright may well be able to note that they commonly sell such services on an L-H basis to the private sector of low-budget retailers. Does that mean you would feel secure about the performance risks in guarding the Capitol with Argenbright's type of screeners in a procurement process without full competition and safeguards, or, might you worry that they would cut the quality of their protective services as this provision incentivizes them to do?

Relaxing CAS and TINA for "Commercial Business Entities"

The Associated Press has already reported this section as a giant giveaway for the biggest traditional defense contractors. GAO Plan Eases Minimum Bid on Defense Pacts, Associated Press, April 9, 2003. This section relaxes CAS and TINA for selected contractors. This is not limited to services. In effect, this provision is a partial repeal of CAS and TINA even for sole-source contracts by contractors selling the largest, most completely noncommercial weapons systems to the Pentagon.

There is every reason not to repeal, even partially in this way, CAS and TINA. As for TINA, Congress enacted it precisely because contractors were able to grossly overcharge the government in the absence of the mandatory TINA disclosure of cost and pricing data and the

capacity of the government to recover for defective pricing. As for CAS, this would let contractors with big-ticket firm fixed-price contracts have them be exempt from cost accounting standards. This will let them play accounting games, as to the allocation of costs between those contracts and the cost-reimbursement items often produced in the same shop.

This section's current wording says "The term 'commercial entity' means any enterprise whose primary customers are other than the Federal Government." So, this section apparently continues to count, for deeming an enterprise to be a "commercial entity," customers which themselves are primary contractors of the Federal Government engaged in traditional defense limited-competition big-ticket item contracting. For example, when General Dynamics and Lockheed Martin each subcontract with the other to produce subsystems for major weapons systems – say, one makes the avionics, the other makes the plane, and the plane is sold to the government under the most traditional basis of a defense procurement with sole-source or limited competition - the SARA provision counts those subcontracts toward considering GD and Lockheed Martin as being in the private, commercial, nongovernmental market. This does not advance the goal of bringing nontraditional contractors to sell to the government. And, this does not substitute an alternative discipline for giving up CAS and TINA. It simply repeals the safeguards against abuses.

Title V – Other Matters

Opening the AOther Transactions≅Authority Super-Exemption

A provision of SARA opens up the use of the super-exemption called Aother transactions≅ (OT) authority. OT authority exempts the contractor from every safeguard extant starting with the FAR, the statutory charters (FPASA and ASPA), CICA, FASA, FARA, and even the Federal Grant and Cooperative Agreement Act. The Defense Department received OT authority, only for the specific and narrow purpose of research and development, and prototypes, to obtain advance technology of ultimately military value from nontraditional suppliers – not just commercial companies, but, say, small high-technology firms completely without the willingness to comply with the most rudimentary governmental rules or to cope with the most basic governmental principles on intellectual property. The Homeland Security Act of 2002 extended OT to that department.

Even in those narrow contexts, OT raises concerns. When the GAO took a look at the actual experience of DOD=s use of OT, it found that of 97 contractors with OT agreements, 84 were traditional defense contractors. *Acquisition Reform: DOD=s Guidance on Using Section 845 Agreements Could Be Improved*, GAO/NSIAD 00-33, April 7, 2000. This strongly suggests that even under existing law, OT does not actually get used to bring in nontraditional suppliers, but simply immunizes traditional ones from vital, basic legal requirements. As for extending OT to DHS, it shows how a seemingly simple extension of OT turns out to be fraught with ambiguities, uncertainties and loopholes. See Joseph Summerhill, Procurement Within the Department of Homeland Security: A Brief Overview of the Homeland Security Act of 2002, The Procurement Lawyer, Winter 2003, at 11. OT is not just commercial treatment. It is like a license to take the government's money but be outside of the procurement law – all of that law.

This section would extend OT authority throughout all civilian agencies, including not

just research and development but prototype projects as well, whenever it is for Adefense≅ or "response" against various kinds of loosely-defined Aattack≅ under the umbrella of terrorism. By making it government-wide under loose definitions, it becomes a permanent super-exemption, far beyond what the casual reader may think is the provision=s core purpose DHS was a sprawling department, but, at least, it is just one department. For the government as a whole, as this section would extend OT, it is not clear what gets swept up in this loose definition. For example, almost any civilian IT prototype project of the government, even, say, upgrading the environmental-management IT for EPA or the Park Service, must have some kind of security (Adefense≅) against hackers. A Adefense≅ primarily against anyone, like ordinary hackers, might, some would argue, also serves as a Adefense≅ for this provision. Almost any civilian law enforcement prototype project of the government, even, say, the collection work of the IRS or the incarceration work of the Federal Prison System might, some would argue, be pressed into service after an Aattack.≅ It is not clear whether the OT super-exemption provision could thus expand to apply to traditional contractors conducting mundane daily activity. Section 502 thus typifies the provisions in SARA that relax safeguards without competition or market disciplines of any kind, just as a giveaway termed an "incentive."

"Emergency Procurement Flexibility" - Contracts for Halliburton and Bechtel Without Safeguards?

Recently, a firestorm of controversy surrounded contracts for Halliburton, Bechtel and others relating to Iraq. I have done a fair amount of discussion in the print and broadcast coverage about this and thereby acquired some familiarity with the procurement issues. Much suspicion developed because the contracting methods relaxed key safeguards: the Defense Department made its contract with Halliburton on a sole-source basis; AID reduced competition and invited contractors like Bechtel for a truncated and initially secret proceeding. It is important to review carefully provisions like this one that, while blandly and technically worded, could allow contracts of this kind to Halliburton and Bechtel, on a permanent basis, while foregoing basic safeguards.

This warrants some background. The Homeland Security Act relaxed an array of procurement safeguards for DHS itself permanently in section 833, and, throughout the government in Subtitle F, for one year, for anything usable in loosely-defined Adefense≅ or "response" to listed dangers. Subtitle F was only for one year. Section 601 makes that one-year government-wide lapse in safeguards, permanent. The Halliburton and Bechtel contracts would not be all that hard for officials sympathetic to those contractors to fit into this exemption's definition, by saying that the contracts are part of an occupation said to be a pre-emptive "response" to the listed dangers. I have seen no disclaimer by the Administration against applying Subtitle F to Iraq reconstruction contracts, and, of course, that process has been so marked by lack of sunshine in this regard that bipartisan sunshine bills have been introduced.

What these SARA provisions would permanently relax for Halliburton and Bechtel-type contracts makes for truly wide-open exemption: for example, the exemptions from CAS and TINA hitherto reserved for Acommercial≅ items, meaning, those with real private market competition, get opened up literally for Aany≅ items, government-wide. (Section 855 states that: the exemptions for commercial items would apply Awithout regard to whether the property or

services are commercial items.≅)

Moreover, presumably this section could operate to define the work by Halliburton and Bechtel, in cost-reimbursement contracts, as "commercial" items, exempting them from CAS and perhaps even from the FAR Cost Principles as to allowability of items. While some still hope that Subtitle F cannot transform cost-reimbursement into commercial contracting, it is hard to be sure: these provisions have been drafted very loosely, evidently to afford total immunity from traditional safeguards.

Treating their work as "commercial" items under this provision might well free Halliburton and Bechtel to play accounting games with their large contracts. For example, each contractor has plenty of other fixed-price government contracts. By shifting costs from those contracts to these (easily enough done as to executive pay, pension contributions, etc. once the contractor is released from the disclosure and consistency requirements of CAS), Halliburton and Bechtel could inflate their costs under these contracts, and pocket extra profits on the other ones. Freed from cost principles about allowability, Halliburton might even use the government's own money to lobby the Congressmen voting for this provision by wining and dining them at vacation facilities and then getting government reimbursement.

Those who disbelieve this, are just not familiar with what just how "liberating" it is to the big cost-reimbursement contractors like Bechtel and Halliburton to be exempt from CAS and the cost allowability rules. Recall that though indemnification is classically reserved for ultrahazardous nuclear and rocket-launching activity, not just construction in a postwar zone, the White House gave Bechtel the sweetener of government indemnification on its contract for any negligence as to, say, unexploded land mines, a real act of White House generosity. Why would the White House not give Bechtel and Halliburton generous section 601 treatment too?

The provision adds some more lapses of safeguards too. It extends the fuller range of commercial item exemptions in section 833 (not previously fully in section 855(a)(2)), and extends the simplified acquisition relaxations in section 853 (not previously fully in section 855(b)), to the new permanent government-wide basis.

It seems like this section renders germane any reasonable amendments to let the sunshine in on Iraq reconstruction contracts.

Amendments to Consider for SARA

Sunshine In Iraq Reconstruction Contracting

As mentioned above, problems that have emerged as to lack of sunshine and sole-source or limited-competition arrangements in the Bechtel and Halliburton contracts relating to postwar Iraq. Some of these problems have been highlighted by a request for an investigation by Rep. Waxman, among others, to the General Accounting Office. A procurement reform to address this is in a bill cosponsored by Senators Wyden and Collins, among others, S. 876. Here is that language, omitting some of the later details (lists of committees):

(a) DISCLOSURE REQUIRED.-

(1) PUBLICATION AND PUBLIC AVAILABILITY.-The head of an executive agency of the United States that enters into a contract for the repair, maintenance, rehabilitation, or

construction of infrastructure in Iraq without full and open competition shall publish in the Federal Register or Commerce Business Daily and otherwise make available to the public, not later than 30 days after the date on which the contract is entered into, the following information:
(A) The amount of the contract.
(B) A brief description of the scope of the contract.
(C) A discussion of how the executive agency identified, and solicited offers from, potential contractors to perform the contract, together with a list of the potential contractors that were issued solicitations for the offers.
(D) The justification and approval documents on which was based the determination to use procedures other than procedures that provide for full and open competition.
(b) CLASSIFIED INFORMATION.- (1) AUTHORITY TO WITHHOLD.-The head of an executive agency may- (A) withhold from publication and disclosure under subsection (a) any document that is classified for restricted access in accordance with an Executive order in the interest of national defense or foreign policy; and (B) make it available to the Senate and House committees of jurisdiction.

Quotas in Contracting-Out

In the last Congress, the problem of quotas for contracting-out received much consideration. A somewhat limited provision, dealing only with "arbitrary" quotas, received enactment in the omnibus continuing resolution. The House itself had adopted language, proposed by Rep. Moran and supported by Rep. Davis, quoted here:

"None of the funds made available in this Act may be used by an executive agency to establish, apply, or enforce any numerical goal, target, or quota for subjecting the employees of the agency to public-private competitions or converting such employees or the work performed by such employees to private contractor performance under Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy."

Because SARA is not an appropriation bill, the following language is suggested, just revising the terms that relate to appropriation limitation:

"No executive agency shall request proposals, award contracts, or otherwise use its procurement authority to establish, apply, enforce, implement, or attain any numerical goal, target, or quota for subjecting the employees of the agency to public-private competitions or converting such employees or the work performed by such employees to private contractor performance under Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy."

The argument for this provision was ably made by Rep. Davis, quoted here from 148 Cong. Rec. H5324 (July 24, 2002)

Mr. TOM DAVIS of Virginia.

Mr. Chairman, I rise to speak in favor of the amendment. The question has always been do we take a matter in-house or outsource it. The overriding goal of procurement policy should always be, how did we get the best value for the American taxpayer, period; how do we pay the least cost for the best service. Sometimes this can best be done in-house with trained Federal workers who have done something over a long period of time. Sometimes it can be done more efficiently by taking it out to the private sector. Sometimes it can be done because the private sector has a certain expertise and experience level we just cannot get through the Federal employees.

Now, the previous administration had numerous initiatives whereby they would eliminate Federal jobs, and they defined their success by how few Federal employees they had. This was a mistake. What we should have been asking was how much money do we save the American taxpayer, not how many employees we have, how much we are outsourcing and the like.
In some cases the jobs eliminated did not save anything because these jobs were off-budget. They were fee paid for, and they were not costing the taxpayers or the general fund a nickel. In some cases we found out we eliminated Federal jobs, but it ended up costing us more money by going outside. But it was driven by quotas, it was driven by numbers, and I submit that is the wrong approach; and that is the problem with the current legislation, which is why I support the Moran amendment because the current legislation looks at arbitrary percentages and says when it comes to outsourcing and competing things in-house, we are going to look at certain percentages in certain agencies, and we are going to define it by this rather than where do we think we can get the best value for the American taxpayer, not how much money will it save.

There is precious little evidence that the elimination of Federal employees by itself saved money during the previous administration. In some cases, as I noted before, these were fee-based employees, and whatever happened was not going to cost the taxpayers or fee payers a penny, but it was arbitrary. Competitive sourcing is a good thing; but arbitrary quotas, numerical targets, are a bad thing. I would say to this body that the Moran amendment eliminates the arbitrary numbers. This will still allow discretion within Federal agencies to go and compete things. We should encourage them to do that where it makes sense and where we can bring savings to the American taxpayers. Our goal should not be to preserve jobs at the Federal level, nor should it be to get a certain percentage to get outsourced. Our number one priority that should drive procurement policy, how do we get the best value to the American taxpayer, this amendment furthers that goal. That is why I urge my colleagues to support it.

Corporate Expatriates

In the last Congress, considerable controversy surrounded companies – termed "corporate expatriates" as shorthand – like Tyco or Ingersoll-Randwhich transferred their corporate citizenship abroad to Bermuda or similar tax havens to reduce United States taxation, yet continued to seek federal contracts. A House bill, H.R. 3884, "The Corporate Patriot Enforcement Act," also known as Neal-Maloney, to deny contracts to such corporate expatriates, had over 300 cosponsors but was not allowed a floor vote. Rather, a narrow provision was enacted as section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395,just for Homeland Security Department contracts. SARA aims to make permanent, government-wide,

certain procurement provisions in the Homeland Security Act. So, here is a version of that Homeland Security Act provision that would also make permanent, government-wide, as to contracts and subcontracts, the corporate expatriate procurement provisions in the Homeland Security Act:

"The Federal Acquisition Regulation shall be revised to bar the award of any contract or subcontract to a foreign incorporated entity which is treated as an inverted domestic corporation under subsection (b) of 6 U.S.C. 395, applying the definitions, special rules, and waiver authority of 6 U.S.C. 395 (c) and (d)."

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I thank the Committee for the opportunity to submit this testimony.

Chairman TOM DAVIS. Go ahead. Mr. Leinster, thanks for being here.

Mr. LEINSTER. Mr. Chairman and members of the committee, I am Bruce Leinster, director of contracts and negotiations of IBM's Global Government-Industry Group, I guess effectively IBM's chief procurement executive.

Thank you for inviting me today to testify on behalf of the 450 corporate members of the Information Technology Association of America. I am here in my capacity as chairman of ITAA's Procurement Policy Committee.

As you know, many of ITAA's member firms provide computer software and services to the Federal Government, and it is with great pleasure that I represent ITAA this morning.

IBM has worked with the U.S. Federal Government for more than 90 years. IBM provides e-government solutions to a host of agencies, including civilian, defense, and homeland security.

For over two decades, ITAA has been very active on issues and legislation pertaining to Government procurement of information technology. Additionally, our Procurement Policy Committee worked with your staff to recommend some of the provisions contained in the legislation, which was introduced this week.

For these reasons, we are especially pleased to be able to testify in strong support of the Services Acquisition Reform Act [SARA]. We supported the bill when it was introduced in the last Congress and continue our enthusiastic support for this important legislation.

We live in interesting times, Mr. Chairman. Our Nation remains under the threat of terrorist forces that seek to destroy our way of life. When ITAA last testified in support of SARA in March 2002, the creation of the new Homeland Security Department was just being discussed.

Now that it is up and running, we believe that it and other civilian agencies and the Department of Defense need now, more than ever, to have quick, efficient access to IT solutions to address the critical missions now facing them. In this regard, steps that the Government takes in service acquisition reform should be undertaken so as to build public confidence, improve the delivery of critical Government services, and raise the level of agency performance and interagency cooperation across the board.

The Services Acquisition Reform Act is a very comprehensive bill and covers a wide range of subjects. Therefore, ITAA will not be able to comment on all of its provisions in this statement, but we are supportive of the entire bill.

I would like to begin by focusing on what we believe are the key provisions within SARA that are most critical to the meaningful services acquisition reform from our members' perspective.

The first would be the definition of commercial services. ITAA has been advocating this change ever since the enactment of the Clinger-Cohen Act. As you know, commercial items may be purchased through streamlined acquisition procedures because their availability in the marketplace provides buying agencies an incontrovertible reference to quality and competitive price, assuring that these agencies receive the best value for their purchases.

Unfortunately, the definition of commercial services was intended to be the same as commercial items when Clinger-Cohen was passed by Congress, because commercial services and items share the same policy rationale, justifying streamlined acquisition procedures. Unfortunately, the definition of commercial services was altered slightly, but significantly enough that IT companies may have difficulty in meeting the definition when selling a service to the Federal Government.

In many cases, services failing to meet the definition are not exempt from the onerous cost accounting standard provisions. ITAA believes that the changes in SARA would give commercial services acquisition parity with commercial products, a key distinction.

The next issue is the authorization of additional commercial contracts. ITAA is delighted to support this provision in SARA. We strongly believe that this provision will clarify one of the most troubling problems that has faced the IT services industry since FAR Part 12 was amended.

There seems to be a perception among many in the Federal sector that time-and-materials contracts are not commonly used in the commercial sector. In the case of my own company, IBM, I can testify that not to be the case. ITAA has polled its commercial companies, and we have found overwhelming evidence that T&M contracts are commonly used in the commercial sector along with fixed-price vehicles. They both play an appropriate role in the commercial marketplace, and this provision would provide badly needed clarification of the role of T&M contracts in the Federal sector. This relief cannot come soon enough.

Agency acquisition protests: ITAA was one of the associations recommending this addition to SARA, since we believe that this technical change will act to reduce Federal protests. Currently, when a company objects to a contract award, it has the option to file an informal protest with the contracting agency or a formal protest; for instance, before an administrative forum like the General Accounting Office.

Under current law, in order to obtain a stay of procurement activity, and, thus, retain meaningful relief, should it be determined that the initial contract award was improper—a company must file a protest within 10 days of contract award. This requirement creates a problem. Even though a company may wish to work informally with this agency customer, the reality is that, if the agency does not answer the company within the 10-day post-award period, such a company is compelled to file a GAO protest to stay the procurement. SARA's technical correction will allow companies and agencies to work out misunderstandings regarding this inconsistency.

Finally, Mr. Chairman, ITAA is disappointed that the co-sponsors of SARA could not accept a change to the law regarding the Trade Agreements Act, which was included in last Congress' version of this bill. ITAA has long advocated reform in this area.

TAA is a complex provision that is little understood by many in both industry and Government, but it results in onerous, elaborate, Government-unique tracking, monitoring, and risk for vendors. It also imposes a serious restriction on products available to Federal agencies.

The significant administrative burden and cost imposed on IT contractors is unlike any that they confront in the commercial marketplace. We understand that the purpose of the Trade Agreements Act is to encourage countries to sign the GATT Treaty by precluding Federal agencies from purchasing products made in non-signatory countries. There is no evidence, however, that the act has compelled more countries to sign, nor has it persuaded companies to relocate their manufacturing sites.

TAA does, however, deny to the Federal Government the widest array of products available because vendors are reluctant to establish such monitoring systems separate from their commercial businesses. For this reason, ITAA hopes that the sponsors of SARA will reconsider their decision to remain silent on this issue and to permit an IT exemption from the TAA.

Thank you.

[The prepared statement of Mr. Leinster follows:]

TESTIMONY

OF

BRUCE E. LEINSTER

Director, Contracts and Negotiations
IBM GLOBAL GOVERNMENT INDUSTRY

BEFORE THE

HOUSE GOVERNMENT REFORM COMMITTEE
2154 RAYBURN HOUSE OFFICE BUILDING

ON THE

SERVICES ACQUISITION REFORM ACT (SARA)

ON BEHALF OF THE

INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

APRIL 30, 2003

Introduction

Mr. Chairman and Members of this Committee, I am Bruce E. Leinster, Director of Contracts and Negotiations, IBM Global Government Industry Group. Thank you for inviting me today to testify on behalf of the 450 corporate members of the Information Technology Association of America (ITAA). I am here in my capacity as the Chairman of ITAA's Procurement Policy Committee. As you know, many of ITAA's member firms provide computer software and services to the Federal government, and it is with great pleasure that I represent ITAA this morning.

IBM has worked with the U.S. Federal Government for more than 90 years. IBM provides e-Government solutions to a host of agencies, including civilian, defense, and homeland security.

For over two decades, ITAA has been very active on issues and legislation pertaining to government procurement of IT. Additionally, our Procurement Policy Committee worked with your staff to recommend some of the provisions contained in the legislation to be introduced this week. For these reasons, we are especially pleased to be able to testify in strong support of the Services Acquisition Reform Act, or SARA. We have supported the bill when it was introduced in the last Congress, and continue our enthusiastic support for this important legislation.

We live in interesting times, Mr. Chairman. Our nation remains under the threat of terrorist forces that seek to destroy our way of life. When ITAA last testified in support of SARA in March of 2002, the creation of the new Homeland Security Department was just being discussed. Now that it is up and running, we believe that it, the other civilian agencies and the Department of Defense need now more, than ever, to have quick, efficient access to the IT solutions to address the critical missions now facing them. In this regard, steps that the government takes in services acquisition reform should be undertaken so as to build public confidence, improve the delivery of critical government services, and raise the level of agency performance and interagency cooperation across the board.

Even without the persistent threat to our national security, ITAA believes that it is most appropriate for Congress and this Committee to consider changes to the acquisition of services by the Federal agencies for two reasons. First, ITservices has been the fastest growing sector in Federal IT procurement arena. Second, the Federal government is still forecasting a dramatic decrease in the number of Federal IT workers in the next five years due to retirements, and, as a result, IT services will likely continue to grow in importance.

Critical Provisions for Meaningful Reform:

The Services Acquisition Reform Act is a very comprehensive bill and covers a wide range of subjects. Therefore, ITAA will not be able to comment on all of its provisions in this statement, but we are supportive of the entire bill. I would like to begin by focusing on what we believe are

the key provisions within SARA that are most critical to meaningful services acquisition reform from our members' perspective:

- Clarification of "Commercial Services" Definition
- Authorization of Additional Commercial Contracts Types
- Share-in-Savings Initiatives
- Telecommuting Changes
- Agency Acquisition Protests

Clarification of "Commercial Services" Definition:
ITAA has been advocating this change ever since the enactment of the Clinger-Cohen Act. As you know, commercial items may be purchased through streamlined acquisition procedures because their availability in the marketplace provides buying agencies an incontrovertible reference to quality and competitive price, assuring that these agencies receive the best value for their purchases. The definition of "commercial service" was intended to be the same as that of "commercial item" when Clinger-Cohen was passed by Congress because commercial services and items share the same policy rationale justifying streamlined acquisition procedures. Unfortunately, the definition of commercial services was altered slightly, but significantly enough that IT companies may have difficulty in meeting the definition when selling a service to the Federal government. In many cases, services failing to meet the definition are not exempt from the onerous Cost Accounting Standards (CAS). ITAA believes that the changes in SARA would give commercial services acquisition parity with commercial products, a key distinction.

Authorization of Additional Commercial Contract Types:
ITAA is delighted to support this provision in SARA. We strongly believe that this provision will clarify one of the most troubling problems that has faced the IT services industry since the changes to FAR Part 12. There seems to be a perception among many in the federal sector that time and materials contracts are not commonly used in the commercial sector. In the case of my own company, IBM, I can testify that not to be the case. ITAA has polled its commercial companies and we have found overwhelming evidence that T&M contracts are commonly used in the commercial sector along with fixed price vehicles. They both play an appropriate role in the commercial marketplace, and this provision would provide badly needed clarification of the role of T&M contracts in the federal sector. This relief cannot come soon enough.

Share-in-Savings Initiatives:
ITAA has supported the Share-in-Savings initiative since the Clinger-Cohen Act hearings. We believe that it offers Federal agencies another procurement approach to achieve needed IT modernization. This approach has been particularly successful in the state and local government arena, and it has a track record of success in the Federal Government where it has been tried. We believe that legislation may be needed to encourage more agencies to utilize this contracting approach to bring value and efficiency to Government program administration. The private sector has willingly invested in upgrading the government's infrastructure. Where this approach has been used, the companies were paid from the savings, and the government agency benefited from the modernization. Thus, both sides share in a win-win, all to the advantage of the taxpayer. We applaud the co-sponsors, Mr. Chairman, for again including this provision in SARA, which will

provide more flexibility to the agencies and to the contractors that select to use the shared savings approach. ITAA was supportive of the provision on Share-in-Savings added to the E-Government Act last year, and believe that this language is the next logical step in expanding its use by federal agencies.

Agency Acquisition Protests:
ITAA was one of the associations recommending this addition to SARA since we believe that this technical change will act to reduce protests. Currently, when a company objects to a contract award, it has the option to file an informal protest with the contracting agency or a formal protest, for instance, before an administrative forum, like the General Accounting Office (GAO). In order to obtain a stay of procurement activity, and thus, retain meaningful relief should it be determined that the initial contract award was improper, however, under current law, a company must file a protest within ten days of contract award. This requirement creates a problem: Even though a company may wish to work informally with its agency customer, the reality is that if the agency does not answer the company within the ten day post-award period, such a company is compelled to file a GAO protest to stay the procurement. SARA's technical correction will allow companies and agencies to work out misunderstandings regarding contract award without resorting to time-consuming, costly protest litigation.

Telecommuting for Federal Contractors:
ITAA is disappointed that this common sense provision requires an Act of Congress to implement. With the advances in technology, it should be evident to the federal agencies that contractor employees are able to perform their functions without always being physically present on the agencies' sites. We understand, of course, that there are circumstances where this presence is required, but in many cases, this language will allow for contractors to perform their work more efficiently and effectively.

Trade Agreements Act:
ITAA is disappointed that the co-sponsors of SARA could not accept the change to the law regarding the Trade Agreements Act, which was included in last Congress's version of this bill. ITAA has long advocated reform in this area. TAA is a complex provision that is little understood by many in both industry and government, but it results in onerous, elaborate, government-unique tracking, monitoring, and risk for IT vendors. It also imposes a serious restriction on products available to Federal agencies. The significant administrative burden and cost imposed on IT contractors is unlike any that they confront in the commercial marketplace. We understand that the purpose of the Trade Agreements Act is to encourage countries to sign the GATT treaty by precluding Federal agencies from purchasing products made in non-signatory countries. There is no evidence, however, that the Act has compelled more countries to sign, nor has it forced companies to relocate their manufacturing sites. TAA, however, does deny to the Federal government the widest array of products available because vendors are reluctant to establish such monitoring systems separate from their commercial business. For this reason, ITAA hopes that the sponsors of SARA will reconsider their decision to remain silent on this issue and to permit an IT exemption from the TAA.

Other Provisions Supported by ITAA:

As I mentioned in the beginning of my statement, there are a myriad of other provisions in SARA that ITAA supports. We are unable to address them all even in our written statement. I would now like to highlight only a few. There is a number of workforce and process-oriented provisions contained in SARA are also of interest to ITAA. They include:

Acquisition Workforce Recruitment and Retention:
By the middle of this decade, the Government will face significant retirement numbers, particularly within its acquisition workforce. Agencies will be left to attract not only talented individuals, but also those individuals capable of being schooled in the new contracting practices that have evolved over the last decade. These individuals will be called upon to facilitate the government's increasingly complex programmatic requirements.

Recognizing the growing urgency of the government's human resource needs, ITAA is pleased to support the Chairman's goal to establish an acquisition workforce recruitment and retention pilot program. This program will assist agencies in matching their respective workforces efficiently and effectively to their programmatic needs, and ITAA stands ready to assist the Subcommittee in this important effort.

Government-Industry Exchange Program:
ITAA supports any exchange program that improves the communication between government and industry. We had already endorsed H.R. 2678, the Digital Tech Corps Act of 2001, which Congressman Davis introduced with several cosponsors in the 107th Congress. We also supported the related provision added to the E-Government Act last year. ITAA continues to be very supportive of extending this program.

Acquisition Workforce Training Fund:
Hand-in-hand with recruitment as a human resources issue for the government over the next few years is the capacity for the government to train its acquisition workforce. Throughout the 1990s, the government embarked on a substantial reform of the Nation's acquisition laws and regulations. This reform laid the foundation for innovative acquisition methodologies to streamline and improve the government's purchasing process.

For acquisition reform to be of any value, however, those who implement the acquisition system must understand how it works. Despite programs put in place with previous acquisition reform legislation, such as the Federal Acquisition Institute, training programs throughout the government are still insufficient. ITAA has long been a supporter of increasing funding for employee training. We have also been highly critical of the fact that these funds were too often the first cut when budget reductions were necessary.

Establish a Chief Acquisition Officer and CAO Council:
ITAA supports naming Chief Acquisition Officers and the creation of a CAO Council. Many agencies already have such a position and this will make it uniform across all federal agencies.

Establish a Regulatory Review Process:
Despite a decade of acquisition reform from the Federal Acquisition Streamlining Act to the Clinger-Cohen Act, many laws and regulations still inhibit greater use of commercial practices. What government and industry needs is a continuous review of these laws and regulations, especially in light of the ever-changing dynamics of our marketplace. By so doing, we will maintain a constant critical eye on acquisition law, always working toward the optimization of the acquisition process. For this reason, ITAA supports the review process to identify unnecessary laws and regulations. ITAA would also appreciate the opportunity to participate in this review process.

Conclusion

ITAA thanks you for this opportunity to comment on this critical piece of legislation. We also stand ready to assist you in any modifications or additions to SARA. We again commend the Chairman and the cosponsors for taking on this important and timely reform effort. Thank you for the opportunity to submit our views.

Chairman TOM DAVIS. Thank you very much.

Mr. Wagner, next, please.

Mr. WAGNER. Thank you, Mr. Chairman, Mr. Waxman, members of the committee. My name is Mark Wagner. I am with Johnson Controls, and I am here today on behalf of the Contract Services Association of America, representing a wide range of over 400 companies providing services to the Federal Government.

We are very pleased that you have recognized the need for and have introduced SARA. In fact, last night at dinner, when I was explaining to my 14-year-old daughter what I was going to be doing today, she was very impressed that you named the bill after her, and, trust me, it is tough for a father to impress their 14-year-old. [Laughter.]

Chairman TOM DAVIS. Well, we do anything to get support. [Laughter.]

Mr. WAGNER. I appreciate it. Thank you.

In all seriousness, Mr. Chairman, in your letter of invitation you asked several questions, and let me try to answer those specifically.

First, you asked whether the various provisions of SARA would help the Government address the lack of adequately trained personnel and procurement professionals. Absolutely. Training and education of the work force is a vital component of the reform process, and your bill provides an innovative method of funding for training and is a necessary and positive step toward ensuring the acquisition work force has the proper tools to implement service acquisition reform, particularly with regard to performance-based service acquisition, which holds great promise to reduce costs while increasing service and quality. But properly implementing performance-based contracting is not easy, and acquisition work force training is essential to its success.

Also, we support the SARA provisions that would authorize the development and utilization of a personnel exchange program between the Government and the private sector to promote a better understanding of, and an appreciation for, acquisition issues confronting both parties.

Your second question was whether the provisions of title II, including the establishment of a Chief Acquisition Officer, will improve the Government's acquisition management function. The establishment of a new CAO would help ensure that acquisition activities are properly managed at civilian agencies, and such a position can ensure the proper monitoring of acquisition policies, activities, and evaluate them on performance measurements. It would also focus attention and establish accountability for the acquisition of services.

Third, you asked if it was constructive to again undertake a review of the regulatory and statutory process surrounding acquisition to determine what barriers exist to reform. Absolutely. Such a review has not occurred since the monumental report on the Acquisition Law Advisory Panel, which was the basis for the 1994 Acquisition Streamlining Act.

Periodically, reviewing our laws and statutes is necessary to ensure what we have on the books contributes to a streamlined and effective process that allows the Government to take advantage of

commercial practices while at the same time and, most important, protecting the interests of the U.S. taxpayers.

With regard to performance-based contracting, you asked if the preference for the use of these contracts establishes a needed incentive to significantly increase their use governmentwide. The answer is, most certainly. The SARA provisions for performance-based acquisition should go a long way in increasing their use throughout the Government.

Authorizing extension options will leverage the benefit of performance-based contracts. Treating certain performance-based contracts as contracts for commercial items will help encourage their use and increase competition, and establishing a Center of Excellence for service contracting will identify the best practices to help enhance the use of performance-based contracting.

Your last question was whether the other provisions in title IV of SARA, including those regarding the use of time-and-materials contracts, will increase leverage to the commercial marketplace. Again, the answer is yes. The bill would expand the availability of contract types by use of Federal agencies acquiring commercial items, including standard, commercial-type contracts such as T&M or labor-hour contracts. In the commercial marketplace, services are regularly acquired on a fixed rate per hour or day because the method is flexible and predictable.

There are several other provisions worth noting. Improving payment efficiencies for service contractors is a win/win for both the Government and private sector contractors. It will save money for the Government because contractors will have less carrying costs that would otherwise be passed on to the Government.

In this electronic age, we should be able to provide electronic invoices and be paid electronically, "as soon as possible." Too often payments are held until the end of the 30-day period allowed by the Prompt Payment Act, even though they could be paid sooner. Small businesses, in particular, will benefit greatly from this SARA provision which will ease cash-flow problems and help companies, particularly those small ones, meet their payroll.

Mr. Chairman, in closing, let me commend you and the members of the committee and your staff for your commitment to improve service contracting for the Federal Government by working to pass this important piece of legislation. I will be happy to answer any of your questions.

[The prepared statement of Mr. Wagner follows:]

CONTRACT SERVICES ASSOCIATION OF AMERICA

STATEMENT OF

Mark Wagner, Vice President-Federal Government Relations
Johnson Controls, Inc.
Chairman, Public Policy Council for the Contract Services Association of America

BEFORE
Committee on Government Reform

HEARING ON
Service Acquisition Reform Act of 2003 (SARA)
April 30, 2003

Mr. Chairman, and members of the subcommittee, my name is Mark Wagner of Johnson Controls. I am here today on behalf of the Contract Services Association of America (CSA), where I serve as Association's chair of its Public Policy Council.

Now in its 38th year, CSA is the premier industry representative for private sector companies that provide a wide array of services to Federal, state, and local governments. Our members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, such as scientific research and engineering studies. Many of our members are small businesses, including 8(a)-certified companies, small disadvantaged businesses, and Native American owned firms. CSA's goal is to put the private sector to work for the public good.

Founded in 1885, Johnson Controls, Inc. is a Fortune 100 Company with global sales in buildings controls technology, automotive interiors, and facilities outsourcing for both government and commercial markets. We provide facility management and base operations support for the Departments of Defense and Energy, NASA and other Federal agencies. On the commercial side of Johnson Controls' facility management business, our customers include companies such as IBM, Compaq, CSC, Hoffman-LaRoche, Novartis, Exxon-Mobil and BP Amoco.

I greatly appreciate the opportunity to testify on services acquisition reform – a subject very important to our membership and, frankly, to all government service contractors.

Services Acquisition Reform -- Introduction

Mr. Chairman, as you noted in your letter of invitation,

> *"The reforms of the early to mid-nineties have resulted in significant streamlining, cost savings, access to technological advancements, and reduced procurement cycles, which have improved the quality of products and services purchased by the federal government."*

You are well aware, certainly, that the reforms accomplished through passage of the 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act have not fully translated into streamlining and efficiencies within the government services contracting arena.

So we are very pleased that you have recognized the need – and have introduced – a ***"Services Acquisition Reform Act (SARA)"***, which can be viewed as a services equivalent to FASA and Clinger-Cohen that have so effectively brought reform to hardware acquisitions.

Mr. Chairman, in your letter of invitation to testify, you asked several questions regarding SARA. Let me specifically answer those questions.

Acquisition Workforce Training

1. Will the various provisions in SARA help the government address the lack of adequately trained procurement professionals?

Absolutely. The training and education of the acquisition workforce is a vital component of the reform process. This is particularly true as we move towards greater reliance of performance based services acquisitions (PBSA), which both Congress and the Administration have embraced.

PBSA holds great promise to reduce costs while increasing service quality; it capitalizes on private sector expertise and leverages technological innovations. But, properly implementing PBSA is not easy and acquisition workforce training is essential to its success. We need to focus on what we mean by "performance based," provide the resources and tools to implement it properly, attract qualified personnel to oversee these contracts – and, most important, provide them proper training.

For the most part, problems that have been identified in connection with the management of service contracts can be traced to inadequate guidance and training for the acquisition workforce. The acquisition workforce dedicated to services contracting is often times far-flung and located in remote areas since local activities contract for their own support services. This is different from the large hardware procurement activities, which tend to be administered from higher-level commands. Therefore, training of the acquisition workforce in the services area needs to be focused on "filtering" down to the lowest level buying activities in all locations. Only by getting these people trained on the options available to them under acquisition reform will true reform be fully adopted into services industry contracts.

Your bill, Mr. Chairman, which provides an innovative method for funding for training, is a necessary and positive step toward ensuring that the acquisition workforce has the proper tools to implement services acquisition reform, including utilizing new contract types such as PBSA. Access to adequate training is important to all agency acquisition

personnel, particularly those at smaller agencies where funds are limited. And, it is clear that innovative funding methods are needed – because specific budget line items for training are all too often cut or delayed. Under SARA, this shortfall would be addressed by requiring a percentage of all administrative fees collected by agencies through Government-wide multiple award contracts and/or purchases from the GSA schedules be devoted to a "Federal acquisition training fund." These funds would be forwarded to the Federal Acquisition Institute (FAI). Presumably, all agencies (particularly the smaller agencies) would have easy access to these funds to provide adequate training for its acquisition personnel. Such a focused initiative would go a long way toward providing the Federal acquisition workforce the skills and knowledge that they need to do their jobs in a dynamic, innovative, and increasingly technological environment.

Also, we recommend that the FAI, as well as the Defense Acquisition University of the Department of Defense, be charged with relying on the private sector for the development and delivery of acquisition training programs. Many private sector firms have extensive experience in the development of course material and the provision of acquisition education and training programs to both private sector and government employees. Indeed, CSA has developed its own series of courses for a program manager certification for services contracting not only for CSA members, but also for the Federal acquisition workforce. PBSA is a core module of the CSA certification program. Service contract training also was one of the top issues selected by CSA members to be focused on during the coming year. Training partnerships would benefit both the public and private sector.

Finally, we support the SARA provisions that would authorize the development and utilization of a personnel exchange program between the Government and private sector to promote a better understanding of and appreciation for acquisition issues confronting both parties.

New Chief Acquisition Officer

2. Will the provisions of title II of SARA, including the one establishing a new chief acquisition officer, improve the government's acquisition management function?

The establishment of a new chief acquisition officer (CAO) would help ensure that acquisition activities are properly managed at civilian agencies. The Department of Defense currently has a comparable position. Such a position can ensure proper monitoring of acquisition activities and evaluate them based on performance measurements. It could also focus attention and establish accountability for the acquisition of services. And, as a non-career employee, the CAO could help streamline acquisition practices and apply best practices from industry.

Another Business Management provision in title II calls for a review of the feasibility of designating the Defense Contract Management Agency as the primary organization responsible for contract management on base operating services (BOS) contracts in excess of $5,000,000. Such a change could bring about more consistency in BOS contracting. However, care needs to be taken so as not to decouple the contractor from the on-base customer in the operation of contracts. As a start, you may want to consider

changing the wording from "responsible for contract management" to "responsible for contract administration."

With regard to the Study on Horizontal Acquisition, this provision could help enhance the efficiency that Government-wide contracts are designed to deliver. As the government increasingly relies on these contract vehicles to help reduce acquisition costs and time, any laws, regulations or policies that hinder their use should be evaluated.

Regulatory and Statutory Review

3. Is it constructive to again undertake a review of the regulatory and statutory process surrounding acquisition to determine what barriers exist to reform?

Yes, such an overall review has not occurred since the monumental report of the Acquisition Law Advisory Panel, which was the basis for the 1994 Federal Acquisition Streamlining Act. Periodically reviewing our laws and statutes is necessary to ensure that what we have on the books contributes to a streamlined and effective process that allows the Government to take advantage of commercial practices while at the same time – and most important – protecting the interests of the U.S. taxpayer. As part of its review, the Panel should be tasked with looking at the monetary threshold levels for all procurement laws (*e.g.,* Service Contract Act and minority business development programs, etc.) and, where appropriate, recommending an increase in the threshold or at least an inflationary adjustment for the program.

Performance-Based Contracting

4. Will the SARA provision providing for a preference for the use of performance-based contracts establish a needed incentive to significantly increase their use government-wide?

Yes. In addition to training, the SARA incentives for PBSA should go a long way in increasing their use throughout the government. Authorizing extension options will help leverage the benefit of performance-based contracts. Treating certain performance based-contracts, as contracts for commercial items will help encourage their use. And, establishing a center of excellence for service contracting will identify best practices to help enhance the use of performance-base contracting.

T&M Contracts and Commercial Item Definition

5. Will the other provisions in title IV of SARA, including those regarding the use of time and material contracts and clarifying the definition of commercial item, enhance the ability of the federal government to leverage the commercial marketplace?

Yes. SARA addresses a critical area that has not fully benefited from the reforms enacted under 1994 Federal Acquisition Streamlining Act and the 1996 Clinger-Cohen Act. This

is the area of services, especially professional and technical services. The bill would expand the available contract types used by Federal agencies in acquiring commercial items to include standard commercial-type contract vehicles, such as time and material (T&M) or labor-hour contracts. In the commercial marketplace, services are regularly acquired on a fixed rate per hour or day because the method is flexible and predictable. For example, T&M contracting allows for a rapid response and is administratively much simpler for both the buyer and the seller. T&M contracts are particularly useful when the scope of work cannot be definitively established to permit a firm-fixed price proposal. The customer will pay only for the effort required and both parties know that the services can be terminated or extended at the customer's discretion. The competitive forces of the commercial marketplace demand that quality services are provided in an efficient manner so that unnecessary days/hours are not spent.

With regard to the definition of commercial item, SARA would clarify the definition to place commercial services on an equal level with supplies in Federal acquisitions. Business entities that are predominantly commercial would be able to do business with the Government under a single set of rules (FAR Part 12); this would encourage these companies to bring their full array of products, technology, and services into the Federal marketplace.

Several Other SARA Provisions are worth noting.

Ensuring Efficient Payment

Improving payment efficiency for service contractors is a "win-win" for both the Government and private sector contractors. It will save the Government money because the contractor will have less carrying costs that would, otherwise, be passed on to the Government. In this electronic age, we should be able to provide electronic invoices and be paid electronically "as soon as possible." Too often payments are held until the end of the 30-day period allowed by the prompt payment act even though they could be paid sooner. Small businesses in particular, will benefit greatly from this SARA provision, which will ease cash flow problems and help small companies meet their payroll.

Share-in-Savings Initiatives

SARA would promote greater use of "share-in-savings" contracts. We recognize that such contract types are unique and require special attention – yet CSA members have successfully performed such contracts. The Energy Savings Performance Contracting program within the Department of Energy is a prime example of such "share-in-savings" contracting. Special attention needs to be paid to ensuring that any cost savings contractors are able to recognize in performance of services not only is shared with the contractor but that measures are put into place to ensure that performance levels are not sacrificed in order to save money. However, with properly written performance standards that identify the true requirement of the buying activity, this should not be a problem. Contracts that specify simply a minimum number of hours to be delivered should also include minimum performance standards that can adequately measure

efficiency when it is realized rather than punish the contractor for delivering too few hours. Finally, as an added incentive to the agency, the agency's portion of the savings generated should not just be funneled back into the U.S. Treasury, but rather should be channeled into the agency toward fulfillment of its mission goals.

Inflationary Adjustments to Simplified Acquisition Threshold

SARA would provide for an inflationary adjustment for the "simplified acquisition threshold" (SAT). This recognizes the realities of the economy. There are other laws, however, where an increase in the threshold should be considered, such as the Service Contract Act. We would urge the Committee to consider increasing other statutory thresholds as the bill moves through the legislative process. The Review Panel, established by SARA, could consider appropriate increases (linked with an inflationary adjustment) for all statutory thresholds in procurement laws.

The Service Contract Act (SCA) remains an important element in the services contracting arena. It provides basic protections to workers employed on Government service contracts, particularly unskilled and semi-skilled workers. While the premise for SCA remains sound, certain revisions are needed to update the Act. For example, the current threshold of $2500, established upon the Act's enactment in 1965, has not been increased since that time. The SCA threshold should be increased to $100,000 – the simplified acquisition threshold level established in FASA for many procurement statutes.

In closing, let me commend you, Members of the Committee, and the staff for your commitment to improve service contracting for the Federal government by working to pass Service Acquisition Reform. I will be happy to answer any questions.

Chairman TOM DAVIS. Thank you much.

Ted, thanks for being with us.

Mr. LEGASEY. Mr. Chairman, members of the committee, my name is Ted Legasey, and I am the executive vice president and chief operating officer of SRA International. SRA is an information technology company. We have been in business for 25 years. We have about 2,500 people serving virtually all the agencies of the Federal Government.

I have been with the company since there were just two of us 25 years ago, and I have watched not only the evolution of our company, but also the evolution of this industry as it has grown to be a partner with Government.

I also serve as the vice chairman of the Professional Services Council, which is the leading national trade association representing the professional technical services industry doing business with the Federal Government.

I appreciate the opportunity to testify this morning on behalf of PSC and its more than 145 member companies. These companies perform the full range of services to every agency of the Federal Government, from IT projects to engineering, consulting, scientific, and environmental services.

I want to express our appreciation to Chairman Davis for his continued leadership on the full range of critical issues related to Government management and procurement, and in particular, his leadership on initiatives to enhance the partnership between Government and the private sector.

As I have seen the relationship of the private sector and Government evolve over the last 25 years, it is clear to me that the partnership model that we have now is a whole lot better way to do business and to ensure that we really get the mission of Government accomplished, and is best for the citizen, in the most effective and economical way possible.

The passage of the Services Acquisition Reform Act, also referred to as SARA, will be an important and timely initiative that will enhance and strengthen that critical partnership. PSC strongly supports SARA and is committed to working closely with the committee throughout the legislative process.

We believe that SARA appropriately focuses on the three critical pillars of acquisition and management. That is people, structure, and process.

First, let me talk about people. In services businesses such as I have been in for many, many years, people are, our most important asset. Indeed, at SRA we believe a key reason that we have been selected as one of the 100 best companies to work for in America for the last 4 years in a row is because one of our core values is caring about our people. People really are the most important thing we have.

The same should be true for the Federal work force. Our focus on people is one of the hallmarks of our industry and one of the reasons that PSC has been a strong, vocal advocate for a well-trained, well compensated Federal acquisition work force.

We are really pleased to see that SARA includes several provisions that address the key human capital issues for the Federal acquisition work force. A well-educated work force has to be there to

be effective in today's environment. Things are changing so fast, the way in which rules and regulations are changing, the way in which new systems and techniques are coming into play, it is really in the best interest of Government and industry for these people to really be trained as fully as possible.

While we prefer to see funds for this training be provided through direct appropriations, as a practical matter, the funds for those things would never survive the budget process. Despite the good intentions of many, it simply doesn't happen. This is a fact which we get reiterated repeatedly in a survey of senior procurement executives that PSC has conducted, and we are providing a copy of that survey for the committee's use.

The second point focuses on the most appropriate structure for managing the growing responsibilities placed on the Federal acquisition system. The bill creates in each agency a Chief Acquisition Officer. It has been mentioned several times today that the Federal Government procures well over $200 billion worth of goods and services. The magnitude of this spending deserves the full attention and commitment of key leadership in each department and agency.

At PSC, we have worked successfully with senior procurement executives in virtually all the Federal agencies. They are dedicated people who have a passion for their work and a strong professional commitment to the execution of their agency's missions. In some cases, these individuals have the power to lead their organizations. Unfortunately, in many cases they simply do not, and the CAO provision seeks to address that.

Almost three decades ago, the Congress created the Office of Federal Procurement Policy. More than a decade ago, the Congress created a position of Under Secretary of Defense for Acquisition and made that individual the third-ranking civilian in the Department's hierarchy. He or she has a seat at the table. Such a position is no less important in the other agencies.

Third, I would like to say a few words about process. We have talked a lot about performance-based contracting and T&M contracts. These are good things if implemented properly. Sure, there are reasons that excesses can take place, but the procurement of services as a commercial item on time-and-materials contracts, as my colleague from IBM indicated, is a very common practice in the commercial world.

There is no reason why, without the right controls in place, that this can't be a very powerful thing in Government. We need to make sure that we have really good companies coming into our industry, and these provisions will ensure that we have that taking place.

The last point I would like to mention is that it is also time to begin a serious discussion about the ways in which Government behaviors as a buyer drives and shapes the market for services. Today you see a number of procurement practices that, if left unchecked and unaddressed, could result over the long term in a market that is not as diverse and competitive as it is today.

As a practical matter, the market is not a bunch of little companies and a bunch of big companies. It is a broad spectrum of companies that form this industry, and we need to recognize that in all the practices that we follow.

The bottom line is that the Government is best served by a robust, diverse, and balanced technology services marketplace. The Government plays an important role in shaping that marketplace. SARA will help play an important role in helping to ensure that marketplace is healthy.

Thank you for the opportunity to testify today, and I would be pleased to answer any questions that you may have.

[NOTE.—The Professional Services Council publication entitled, "PSC Procurement Policy Survey, Navigating a Changing Landscape towards Acquisition Excellence," may be found in committee files.]

[The prepared statement of Mr. Legasey follows:]

PROFESSIONAL SERVICES COUNCIL

TESTIMONY

by Edward E. Legasey
Executive Vice President and Chief Operating Officer
SRA International, Inc.

And

Vice Chairman
Professional Services Council

before the

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

April 30, 2003

TESTIMONY OF
EDWARD LEGASEY
EXECUTIVE VICE PRESIDENT AND CHIEF OPERATING OFFICER
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APRIL 30, 2003

Mr. Chairman, members of the committee: my name is Edward Legasey and I am Executive Vice President and Chief Operating Officer of SRA International, Inc. SRA is a leading provider of information technology services and solutions – including strategic consulting; systems design, development, and integration; and outsourcing and operations management – to clients in national security, health care and public health, and civil government markets. SRA delivers business solutions for text and data mining, contingency and disaster response planning, information assurance, enterprise architecture, environmental strategies and technology, network operations and management, and enterprise systems management. I also serve as the elected Vice Chairman of the Professional Services Council, the leading national trade association representing the professional and technical services industry doing business with the federal government. I appreciate the opportunity to testify this morning on behalf of PSC and its more than 145 member companies that perform the full range of services to every agency of the federal government, from information technology development to high-end consulting, engineering, scientific, and environmental services.

I want to express our appreciation to Chairman Davis for his continued leadership on the full range of critical issues associated with government management and procurement, and, in particular, his leadership on initiatives to enhance the partnership between the government and the private sector. That partnership is essential to our government's ability to deliver high quality services to the citizens.

Nowhere is this partnership more evident, however, than when our nation finds itself engaged in a military conflict such as in Iraq. The extraordinary performance of our men and women in uniform was made possible, in part, through this growing partnership. Indeed, several thousands from across our industry sector are also in the region, many in the very theater of operations, working 24 hours a day to ensure that our military forces have the best support possible. It is at times like these that we are continually reminded of our industry's unique responsibilities and very serious service to our armed forces and our nation. Those responsibilities are humbling and taken very seriously.

The passage of the Services Acquisition Reform Act, also referred to as "SARA," will be an important and timely initiative that will enhance and strengthen that critical partnership. PSC strongly supports SARA and is committed to working closely with the committee throughout the legislative process.

The introduction of this legislation comes at a most opportune time. In this fiscal year, the federal government will spend well in excess of $120 billion on services, nearly half of that in the civilian agencies. In DoD, services spending exceeds hardware purchases, a significant change from a decade ago when the purchases of hardware dominated defense spending. Across the government, while the biggest single category of services acquisitions comes from the information technology arena, the need grows almost daily for a wide range of contemporary solutions, many of which are complex and involve major transformations of processes, changed responsibilities and skill-sets of the workforce. Of course, the use of technology is a key enabler of enhanced performance and efficiency.

This is also an opportune time to pursue new reforms to the acquisition process. As we meet here today, concerns are emerging across industry and within the government about possible regression on the progress in acquisition streamlining and simplification this committee was so instrumental in leading. Last week, PSC released the results of a PSC survey of approximately two-dozen government procurement executives. A copy of our survey report is attached. Among the themes that emerged from that survey was the growing concern of these government professionals about continued support for and commitment to some of the major reforms contained in the important acquisition reform legislation of the last decade. To the extent execution has been imperfect, it is obviously important to strive for continuous improvement, through training and guidance of the workforce, and occasional modifications to policy. Thus, as we seek to move forward, it is vitally important that we maintain our vigilance to reforms already in place. We cannot allow those important reforms to be reversed in any way.

BEST VALUE

I am particularly dismayed that there seems to be a continuing misunderstanding about the meaning of best value contracting. For example, a number of lawmakers signed a recent letter to OMB Director Mitch Daniels that, in addition to criticizing the administration's emphasis on competitive sourcing, also criticized the administration's proposal to enable the use of best value contracting on a limited subset of public/private competitions. The lawmakers said they preferred a process based on a combination of "cost and quality." Yet that combination is, by definition, best value.

Moreover, best value is an objective process. While the government has the ability to match its acquisition strategy and the relative weights of critical factors to a given requirement, government is also required to score source selection decisions against a set of firm numerics assigned to each weight. It is nothing like the wild west that some seem to believe. Most importantly, it is, by any logical measure, the way virtually everything should be bought. Under the best value construct already contained in the Federal Acquisition Regulation, the full array of options, from low cost/technically acceptable to substantial cost and technical trade-offs, are available. That is the way we make decisions in our personal lives; it is the way we make decisions in the commercial sector; and it is today the way the majority of government acquisitions are made. Only under the OMB Circular A-76 process, that represents less than 1% of all federal procurements, is such a common sense approach not allowed.

We also hear concern from some that in best value decisions, price is not given adequate consideration. There is no data to support such an allegation and, more importantly, the degree to which price is evaluated is, and should be, directly related to the complexity of the agency's requirements and its available resources. In other words, the emphasis varies from procurement to procurement and is clearly a determination that can and must be made solely by the procuring agency. However, price is always a significant evaluation factor. From our own

experience and that of many of my colleagues, I can tell you that far from cost being inadequately considered, we remain concerned that the very discriminators that best value is designed to highlight—past performance, technical capability, management experience and innovation—are all too often not given sufficient consideration. In other words, our experience in the field is quite the opposite of the suggestion that cost is inadequately considered.

With regard to SARA, it appropriately focuses on the three critical pillars of acquisition and management: people, structure and process.

A FOCUS ON PEOPLE

Mr. Chairman, for services companies, people are the most important aspect of our business. The same is true of the federal workforce. Too often, however, the impact of legislative or regulatory actions on the contractor or the federal workforce is ignored or dismissed as immaterial. That is a serious policy mistake when dealing with the federal workforce; for PSC members, it is a prescription for failure. Our focus on people is one of the hallmarks of our industry and one of the reasons why PSC has been a vocal advocate for a well-trained, well-compensated federal acquisition workforce.

SARA properly includes several provisions that address key human capital issues for the federal acquisition workforce. Among them are provisions in Title I of the bill regarding a funding mechanism to ensure that the federal acquisition workforce has meaningful access to on-going relevant training. A well-educated workforce must be kept current on the latest legislative and regulatory changes; on the changing nature of the industry and the products and services they are acquiring; and on the new systems and techniques for fulfilling their critical assignments. Access to training is frequently a competitive discriminator when the private sector seeks to attract and retain talent in our member companies. It needs to be so for the federal workforce, as well.

There is no lack of opportunity for the federal acquisition workforce, but there are continual resource pressures that, in the current environment, are getting worse. Thus, while we would prefer to see training funding provided through direct appropriations, the truth is that such funds rarely compete successfully in the battle for resources. Despite the good intentions of many, it simply doesn't happen, a fact reiterated repeatedly in the PSC survey of procurement executives.

On the other hand, taking a small percentage of the fees collected through GSA schedule and multiple award contract purchases, as PSC has proposed and the bill recommends, is a logical and important step forward. In so doing, Congress will have taken a significant step in addressing the funding for this important matter.

We recommend that the bill be clarified so that the funds "management" by the Federal Acquisition Institute does not require that FAI conduct the training exclusively in-house or exclude private sector training firms from continuing to provide training under contract to FAI or any federal agency. Similarly, we are confident that during future action on this legislation, attention will be given to the training needs of the Department of Defense acquisition workforce. In addition, there are appropriate metrics that can and should be adopted to ensure that the training is part of a coordinated and appropriately established set of performance objectives -- particularly with respect to services contracting -- and is of demonstrated quality in both content and instructional methods.

We also support the government-industry exchange program described in Title I. Both the government and industry benefit from a well-designed, well-executed professional exchange program. We are aware of a very limited number of circumstances in which federal employees have been able to accept rotational assignments in private sector companies; they have had a significant and positive impact for the employee, their agencies, and the private sector companies. Clearly, federal personnel policy issues must be addressed to make this authority meaningful and appropriate safeguards must be put in place to ensure that such an exchange program does not create any conflicts of interest for either the industry or government personnel involved. The Information Technology Exchange Program enacted in the 2002 E-Gov Act, and incorporated here on a government-wide basis, meets these standards.

A FOCUS ON STRUCTURE

Another key theme of this legislation is a focus on the most appropriate structure for managing the growing responsibilities placed on the federal acquisition system. Section 201 of the bill creates in each agency a chief acquisition officer (CAO).

At PSC, we have worked successfully with the senior procurement executives in many of the federal agencies. They are dedicated people who have a passion for their work and a strong professional commitment to the execution of their agencies' missions. In some cases, these individuals have the power to lead their organizations; in other cases, they are viewed as mere implementers.

The federal government spends $220 billion on goods and services. For many agencies, their expenditures on goods and services are at the heart of the execution of their missions. Some (like NASA) spend almost 90 percent of their appropriations on external providers, primarily contractors. Other agencies, such as the USAID, spend similar portions of their funds through a combination of contracts, grants and other funding instruments. The magnitude of this spending deserves the organization's full attention and commitment, and the formal structure of an organization, including the placement of key leadership, is one way to reflect that attention and commitment.

Acquisition is an important management discipline. Congress recognizes the importance of ensuring senior agency leadership focus on acquisitions. Almost three decades ago it created the Office of Federal Procurement Policy. More than a decade ago Congress created the position of undersecretary of defense for acquisition, and made that individual the third-ranking civilian in the department's hierarchy. The position is no less important for other agencies whose mission is not war fighting.

Congress has created through legislation, and many agencies have created administratively, key senior management positions for federal agencies, such as the chief financial officer (under the CFO Act), the chief information officer (under Clinger-Cohen), the Department of Homeland Security Chief Human Capital Officer (under the Homeland Security Act), the directors of the offices of Small and Disadvantaged Business Utilization (under the Small Business Act) and even the inspectors general (under the IG Act).

The General Services Administration has properly created administratively a chief knowledge management officer and several agencies have created administratively chief technology officer positions to focus on that critical subset of their mission roles and responsibilities. There is also legislation pending to create a chief human capital officer for federal agencies, in recognition of the importance of addressing the human capital needs of federal agencies. We recognize that

every agency has different structures and needs. While others are in a better position to determine the exact organizational placement of the chief acquisition officer within each federal agency, we believe that the position of CAO, with authority for ensuring uniformity and accountability across agency activities, is critical. The position of the CAO must be senior enough to ensure that he or she has the requisite authority and influence across the agency.

Similarly, we support creating within the Office of Federal Procurement Policy a Center for Excellence in Service Contracting. If properly staffed, the office can provide critical assistance and guidance to all agencies to improve their successes and share best practices in acquiring needed services. Several agencies are already moving to create a single focal point for their services acquisition activities. For example, the Air Force has established a Program Executive Office for Services, and is also creating acquisitions centers of excellence to focus on the special techniques and procedures to be used when acquiring services. The Army centralized most of its services purchases in the new Army Contracting Agency.

A FOCUS ON PROCESS

The federal government is slowly upgrading the tools and techniques it uses to acquire services. Many of the best practices for services contracting, such as the use of performance-based contracting, have been around for decades. In fact, one of the earliest examples of a well-structured, well-executed, performance-based, incentive services contract was the 1908 Army award to the Wright Brothers for a "heavier-than-air" flying machine. It was a "best value" selection made from among three competitors and the low bidder was disqualified for an adverse past performance record! In 1992, the Office of Federal Procurement Policy issued an excellent guide to performance-based services contracting. In 1999, DoD issued an improved guide, and GSA and other agencies have issued an even better web-based guide to writing a high-quality statement of work for performance-based service contracts.

While progress is being made, it is vital that the methods and procedures that have been available to agencies for their purchases of "goods" also be available when they are purchasing services. As the services federal agencies acquire become more complex and technology-driven, it is particularly important that the agencies have the maximum flexibility to meet their mission needs, consistent with smart acquisition planning and responsible oversight and safeguards.

Many of the provisions in Titles III, IV and V of the bill are designed to do just that. For example, Section 301 explicitly authorizes share-in-savings contracts to be used as appropriate by both defense and civilian agencies. If implemented properly in regulations, and executed properly by agencies, this contract type could provide agencies with a unique means of achieving service delivery goals without the enormous up-front capital requirements that frequently prevent achieving those goals. As the General Accounting Office noted in their recent report to this Committee, there are federal programs in which these types of contracts have been used successfully, and the agencies should have access to this contract type when they (and the contractor bidders) find it appropriate to meet the agency mission.

Similarly, Section 302 creates a powerful tool for the agencies to create performance-based service contracts using annual term incentives.

Section 401 makes permanent the temporary authority that exists to treat performance-based contracts or task orders valued at less than $5 million as "commercial items" eligible for the use of special contracting techniques available for commercial items. We support making the

authority permanent and government-wide. Nevertheless, the arbitrary ceiling under current law or under this provision may not serve the needs of the agencies, and may not attract certain companies and technologies to the federal marketplace. There has been limited use of the test program because of its short life. Neither the contracting officer nor contractor want to invest time and energy in such a limited program. While making that test program permanent is clearly a step in the right direction, more can and should be done to address the barriers to widespread use of commercial item purchases of services.

Section 402 acknowledges that many services federal agencies must acquire are best performed on a time and material or labor-hour basis. It is disturbing, in fact, to hear some suggest that T&M contracting is not a commercial practice. It is, in fact, a very common commercial practice. As a just completed survey of PSC member companies demonstrated, these contract types are used widely in the commercial marketplace, and should be available for use by the federal agencies as commercial items. We are now finalizing our report on this survey. Many of the specialized training needs of federal employees, such as simulators or airport screening, or for network maintenance and troubleshooting that we provide in the commercial and government marketplace, are examples of the types of services that might be most appropriately acquired as commercial items through these T&M or L-H contracts. Moreover, sometimes T&M contracting is used as a first, transitional phase, until the final, detailed problem definition and solution design takes place. In short, T&M is clearly used in the commercial sector and should be allowed in commercial contracting with the government.

In 1994, when the Federal Acquisition Streamlining Act was being considered, there was insufficient time to push for the inclusion of these types of contracts in the definition of "commercial items." Given the nature of services contracting at that time, it was an understandable, but in hindsight regrettable, trade-off. But times have changed, the nature and scope of services acquisition is evolving, and the law should be updated to provide agencies with a contract type that is most appropriate for their needs and consistent with commercial practices.

The bill provides for a limited designation of a company or division as a "commercial entity" and extends the scope of the law from a focus on "transactions" to a focus on the organization that is providing the service. Within PSC, we are discussing the proper measurement of, and threshold for, eligibility as an "entity" and the appropriate mechanisms for entering and the consequences of exiting those thresholds. Nevertheless, we endorse the concept of creating the "commercial entity" authority. There are many examples where the government was willing to look beyond a specific transaction for making a key determination of eligibility. Three examples are the definition of a "segment" to help a contractor assess the necessary coverage of the federal cost accounting standards; DoD's initiatives to create a "single process initiative" that permits a contractor's manufacturing facility to use a single set of processes and, with government permission, to override contrary specific specs and standards included in individual contracts; and the "other transactions" authorities already available for certain DoD and Department of Homeland Security activities that would be extended to the civilian agencies by this bill. We look forward to working with you and Congress to refine this important authority.

COMPETITIVE SOURCING

Among the issues not covered in the legislation that we believe appropriate for consideration by the Congress is that of competitive sourcing. Needless to say, the debate about competitive sourcing and OMB Circular A-76 has been heated and intense. In 2001, Congress directed the Comptroller General of the United States to create an expert commission, that included the

federal employee unions, industry, government, and outside specialists, to study current sourcing policy and to report its recommendations to Congress. The Commercial Activities Panel reported their recommendations a year ago, and key among the unanimous recommendations of the Panel was that public/private competition be conducted in a manner that treats all offerors fairly and considers both cost and non-cost factors. As I stated earlier, it is only under A-76 that best value is not allowed. I urge this committee to address this inequity by actively supporting efforts to bring best value contracting to all public/private competitions. In addition, I urge this committee to support the full implementation of the Commercial Activities Panel recommendations.

BALANCED PROCUREMENT

It is also time to begin a serious discussion about the ways in which the government's behaviors as a buyer drives and shapes the market for services. Needless to say, the impact is significant. Today, we see a number of procurement practices that, left unchecked and unaddressed, could result over the long term in a market that is much different than it is today.

Much of the discussion around balanced procurement is driven by the government viewing the federal procurement market in binary terms—there are small businesses and there are large businesses. In fact, this market is anything but binary; it is multi-layered, and its very diversity is one of its greatest strengths. Thus, when agencies such as HUD put in place radical requirements for any segment of the market—70% of all HUD contracting dollars must go to small business—it has a ripple effect on the marketplace and is a de-facto industrial policy. It is a policy that has had a devastating impact on some mid size companies for whom HUD used to be a significant customer; and it will have a similar impact on those small businesses it is designed to nurture when they prosper and exceed the small business size standard.

Likewise, we have seen other agencies where entire categories of work have been set aside so the agency can make its small business goals. Achieving those goals is, of course, important; but smart management means that they should, to the maximum extent possible, be spread across the agency.

But it is not just small business issues that are in play here. It is clear that the government has many procurements in which a major integrator capability is essential. Sometimes, however, there are alternative strategies available that address that need as well as create other opportunities for mid-size and small businesses - - but those strategies are rarely pursued.

The bottom line is that the government is best served by a robust, diverse and balanced marketplace. The government plays an important role in the shaping of that marketplace and whether it remains robust and diverse. Today, the future of a balanced marketplace is in question. It is time to address this long-term challenge now before the opportunity passes us by.

INTELLECTUAL PROPERTY

The impact of the federal government's statutes and regulatory approaches to the treatment of intellectual property, particularly as they apply to the acquisition of services, merit mention, and possibly future administrative or legislative action. In the last Congress, this Committee launched a review of this matter, and held important oversight hearings. PSC was pleased to testify at these hearings and we support a comprehensive review of the current state of practice on intellectual property affecting services.

CONCLUSION

Mr. Chairman, members of the Committee, services contracting is now the predominant type of acquisition purchase in the Federal Government. But we have not brought the law, the regulations or the acquisition workforce up to date with the marketplace.

In effect, we are asking agencies to acquire services using hardware rules.

The Services Acquisition Reform Act (SARA) recognizes the new realities of the federal marketplace. It has a proper focus on the three pillars of success for services: people, structure and process.

While adjustments can be made to some of the provisions, and other provisions should be added, the Professional Services Council is a strong supporter of the bill in its present form. It deserves prompt passage by this Committee and the Congress.

Thank you for the opportunity to testify. I would be pleased to answer any questions the Committee has.

Chairman TOM DAVIS. Thank you very much. I don't know where to begin, but, Mr. Tiefer, let me just start with you.

You don't have any evidence that the White House played a role in the Bechtel—what you call the "sweetener of indemnification" or the Halliburton contract, do you?

Mr. TIEFER. Oh, on the contrary, my understanding is that the sweetener of indemnification which was given in the Bechtel contracting cannot be given out without White House approval, and I saw repeated references, not from me but in the press, that it had obtained White House approval.

Chairman TOM DAVIS. What about Halliburton? Any evidence the White House was involved with Halliburton? Or the URS Corp., which is Ms. Feinstein's husband's company? I mean, I think this stuff—what we are trying to get away from is no political involvement. We want trained professionals out there in the front line, career, professional Contracting Officers in touch with the customers, know what the customers want, which is sometimes a huge problem in this business, going out, being able to communicate what they want, and then getting the right contractual vehicle and getting the best deal for the Government, the career professionals.

I think it is a philosophical question sometimes whether you trust trained, professional Federal employees if you train them to do this job or if you want everything written with centralized regulations that strap them, so that not only is it inefficient, but the procedures drive the outcome.

We have seen so much waste under that procedure, and that is the concern in bringing this up, not to give the White House or politicians or political appointees control. There has been a lot of stuff, not by you, Mr. Tiefer, but members here that seems to be a misunderstanding of what we are trying to do.

And there are philosophical differences over the best way to approach this, but let me ask you this: Our training fund, I thought at least under the training fund that we set up that I would get you to support that one, and you did compliment me for dropping some language you consider to be on Davis-Bacon and stuff like that. And that is the political realities; if it were up to me, I would have kept it in, but we weren't going to get it passed with that.

But the SARA provision that provides for a work force training fund, this is a fund that you can't knock out in the appropriations process, but when the agency's budget is cut, they don't go to cut training and travel and the kind of things that they usually do, so that we don't have officers that understand the latest techniques and the latest technologies.

And your objections—and I may be misreading it; I want to give you a chance to clarify it—but is your objection based on your view that private firms might do some of the training?

Mr. TIEFER. I am going to plead guilty here. I don't wish to come down hard on the training fund concept.

Chairman TOM DAVIS. OK, phew. [Laughter.]

You can say that loud. I just want to get it. [Laughter.]

Mr. TIEFER. As a law professor, I naturally would like to see a little bit more emphasis on certain areas of training that are not expressly recognized in that provision. But I wish I could shed this negative image and this would be a good place to start. [Laughter.]

Chairman TOM DAVIS. Well, a journey of 1,000 miles begins with the first step.

Let me ask you this: You seem to take the view that the expansion of the commercial acquisition provisions to services is somehow anticompetitive. Do you have any evidence that the establishment of the commercial procedures that was primarily for products in the Federal Acquisition Streamlining Act and Clinger-Cohen reduced competition? Because that would be the appropriate analogy, it seems to me.

Mr. TIEFER. I stand with Angela Styles for the administration when she said, with respect to that provision, that if you are going to do something that makes services more readily treatable as commercial, she said, "I would further recommend that the committee retain current requirements for competitive sales in substantial quantities." It is the dropping of the quantities of sales in the commercial market that creates a risk because——

Chairman TOM DAVIS. Well, it is a risk because you don't have the data, basically, in terms of forming the price. Isn't that the problem?

Mr. TIEFER. It is not just data. It is susceptible to abuse because, if there are not, as Ms. Styles—the reason I read that she correctly says you should retain a requirement for substantial quantities is that anybody can offer anything. I could offer anything. But unless someone is buying it from me in substantial quantities, it could be a shell game in which what I am doing is saying, look, I offer to the commercial market the following service: repairing war planes. So since I am offering repairing war planes in the commercial market, but of course no one buys it from me, so I am offering it, but it is not being borne in substantial quantities. I then take a walk from all the safeguards.

Chairman TOM DAVIS. Well, not necessarily. I mean, again, the key here transparency. The Contracting Officer has to make the case, has to have the data. If it is not there, as it wouldn't be, I think, in the case that you have talked here, it would not apply.

But, look, we are dealing with human beings. Contracting Officers are human beings, and I think we need to understand that they are going to make mistakes once in a while. But the theory here is that somehow, by allowing to take the shackles off them and allow, giving them enough contracting vehicles, enough training, getting them in touch with the customers, things that, frankly, they don't have now and that are costing the Government a lot of money, not through fraud or abuse, but by waste, that we would put up with the mistakes that human beings make occasionally on these to get more streamlined savings.

You have to trust your Federal employees to do that, but we gave a great cadre if people I see out there that are dying to learn the latest technical innovations, to learn the latest procedures, if we just give them a chance, and yet we cut the budgets for training. I mean, that is the theory.

I understand—we have gone back and forth. I have read the history of Government contracts, how we go back and forth between putting the shackles and the handcuffs on these people, so that nobody makes a buck or steals a dollar, but they can't do much of

anything else either. And it is a question of finding the right balance.

So your testimony is helpful, and I think we need to factor all of these in. I have one other question for you.

We talked about these long-term contracts, and you note that nothing in the provision limits the duration; that this is where we authorize agencies to include options in service contracts based on exceptional performance, something that would have to be detailed, taken upstairs, reviewed by—not politicians, not political appointees—by career professionals that are trying to get the job done.

And under those exceptional areas, we will allow options in service based on that performance. The provision is neutral. It is the duration. So it operates under any current limits there are in the length of service contracts.

But can you give us a view on what might be an appropriate limit? Because I think we can agree there may be exceptional types where someone has earned an option, and it is not worth the time and trouble and expense to go out and bid it out maybe for a short period, because someone is performing well; you are getting your money's worth, and there is an agreement on that.

Could you suggest a duration period? Because I am not adverse to putting a duration period in this legislation. I want it to be reasonable. I certainly don't want to leave everybody with the impression that we have cut a sweetheart deal for Halliburton and we want this thing to continue for 100 years.

Mr. TIEFER. It would have to be less than 10 years for the period, and I might couple that. I might couple that because, as Ms. Styles correctly emphasized, it is also important that at the end of whatever period there is that there be full and open competition. The danger is, if we extend, if we take a contractor who under current regulations really shouldn't be getting that contract for longer than 3 to 5 years, and we say you can extend 5 years and another 5 years, which, as I say, 10 years might be a reasonable number, we need a guarantee that at the end of that 10 years there is full and open competition, because, otherwise, the longer a contractor has a particular piece of work, the more entrenched they get. The more that what starts out as——

Chairman TOM DAVIS. They lose innovation. You get no argument from me on that. I mean I don't think we disagree on that.

The question—and public policy is tough. You can take all your theories and stuff, but it doesn't always work out in the process. So, no, I think it is a constructive suggestion. I want you to know I am listening to you, and I was just trying to find out, you know, where that might come down.

If I can have just a couple more questions and then we will move on? I am a little over my 5, but I want to just try to get through this.

Mr. Leinster, many worry that expanding the definition of commercial items will bring more products and services outside the traditional scrutiny of the Federal oversight provisions and that it will undermine the benefits of competition. How do you respond to that?

Mr. LEINSTER. Well, I guess my initial response would be to say that I think it will enhance and increase competition because so many companies, particularly the smaller companies you mentioned this morning, are reluctant to get into the Federal arena because of the onerous provisions——

Chairman TOM DAVIS. Regulations?

Mr. LEINSTER [continuing]. Regulations that they face. So I think it will greatly enhance competition, which, by the way, I do not think is lacking in the first place.

Second, as for scrutiny, I don't think changing definitions or using different contract types is in any way going to reduce scrutiny. Contracting Officers still have the responsibility to determine that prices offered are fair and reasonable, and there are ways to do that when you are dealing with commercial items and commercial services that can be short of imposing these God-awful provisions of the cost accounting standards and/or TINA, for that matter.

Chairman TOM DAVIS. Do you think the Government is disadvantaged in its ability to acquire the most leading-edge technologies by the domestic source restrictions under the Trade Agreements Act?

Mr. LEINSTER. Oh, absolutely.

Chairman TOM DAVIS. I take it from your statement?

Mr. LEINSTER. Yes, absolutely.

Chairman TOM DAVIS. Mr. Wagner and Mr. Legasey, do you have a comment on that? Then I will ask Mr. Tiefer as well. The Trade Agreements Act, the domestic source restrictions there, do you think that limits our ability to get the best deal many times and the best technologies, the lowest price?

Mr. WAGNER. No, I agree, and I also agree with what Bruce was saying with regard to the commercial-like contracts side. It increases competition. At the end of the day if you have encouraged competition all across the board and invited new companies in, I mean I don't know of too many other better ways to find out whether the Government got the best deal and had vigorous competition out there.

Chairman TOM DAVIS. Yes. In fact, what keeps the big companies out isn't the accounting systems and those regulations. What keeps them out sometimes are the IT provisions or the liability provisions that they are not comfortable with.

Mr. WAGNER. Yes.

Chairman TOM DAVIS. But the regulatory provisions are what keep a lot of small companies from getting involved and changing their whole accounting system or their whole lines of production, it has been my experience, having worked in the business for 20 years before I came here.

Mr. LEGASEY. I would agree also, and as somebody who started out as one of two people in the business, I have had a lot of people over the years come to me and ask me about how do you get into this business and how you get started. It is just daunting if you really don't have an understanding of that.

So any way in which we can ease the avenues by which responsible small businesses can participate, without having to go through the gauntlet of becoming CAS-qualified and all these

things before they can begin to deliver services and products, is a healthy thing.

As a practical matter, this is a very competitive marketplace. I am sitting here trying to figure out where all this stuff that goes up without any competition is, and I figure I have missed the mark for 25 years. [Laughter.]

I haven't seen this stuff. I mean it just doesn't exist in the part of the industry that we are a part of.

Chairman TOM DAVIS. Yes, and I can assure you they didn't write the bill, either, those people, because I haven't talked to them, either.

And I remember when SRA started.

Mr. LEGASEY. Thank you, sir.

Chairman TOM DAVIS. I was at a young company called Adtech then and met with your CAO. We just talked about some ideas. How large are you now?

Mr. LEGASEY. We are 2,500 people.

Chairman TOM DAVIS. Thank you. How many of them in northern Virginia?

Mr. LEGASEY. Most in northern Virginia, sir. [Laughter.]

Chairman TOM DAVIS. OK. Let me just ask Mr. Tiefer——

Mr. LEGASEY. But some in California. [Laughter.]

Chairman TOM DAVIS. And you are looking at that Baltimore office, aren't you? [Laughter.]

Mr. LEGASEY. We actually have a Baltimore office. [Laughter.]

Mr. TIEFER. With respect to the specific thing of the Buy America Act exemption for commercial IT, I was thrilled when the draft of the bill dropped that. [Laughter.]

So I would like to add that to the items I was praising you for.

Chairman TOM DAVIS. Hey, you have taken two steps today. [Laughter.]

Thank you. No, thank you very much.

Would you want to add anything else?

Mr. LEINSTER. A comment on participation: Certainly, my company participates in Federal Government procurements and has CAS-compliant systems, but we shield those systems and that participation from the vast majority of our company. It is those other areas of my company that the Government wants to access, because you are buying commercial systems.

Chairman TOM DAVIS. Right.

Mr. LEINSTER. And, yet, it is extraordinarily difficult to bring those skills into this arena without exposing them to the requirements that my commercial divisions are not prepared to and will never be——

Chairman TOM DAVIS. Well, the theory is, if you are competing with this set of systems out in the open marketplace every day at the commercial level, that you are competitive and we don't have to come back and recheck the configuration. I mean that is the whole key.

But this is very, very confusing for the average Member. I have been in business 20 years, and I still learn things every hearing in terms of the way this operates. That is why I think you have shed a lot of light on the record. I am going to probably come back for

questions, but I want to give Mr. Waxman an opportunity to ask some questions. I know he has something.

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. Tiefer, you and Ms. Styles from the administration have a sort of mirror image of the way you have made your presentation, but in many places you came out in the right—not in the right, but in the same spot. She was praising all the things she liked, but left to the bottom of her testimony the things that she was critical of. You came out with the criticisms right up front, and reluctantly—maybe not reluctantly—but under questioning, you admitted, of course, there are parts of this bill that you like.

I think all of us like the intent of this bill. We want to train people to handle the acquisition of services who know what they are doing, that are going to be professional about it, and we want more people, businesses, to be able to come in and offer these services.

But a very wise Republican President said, "Trust but verify." I don't think we want to let somebody have the job, even as well-trained as they might be to enter into these contracts, but then eliminate the safeguards in the law that verify that the Government and the taxpayers that are paying for all that—let's don't forget it is the taxpayers that are paying all this money—that we are getting our money's worth. It serves no one's interest to waste the taxpayers' dollars. So that requires us to look at the details.

Section 404 of the bill expands dramatically what kinds of products and services can be considered, "commercial items." If it is considered a commercial item, then it is treated differently.

Mr. Tiefer, the bill says that, if it is produced by an entity who has 90 percent of its sales over the past 3 years to non-governmental entities, then it would be considered a commercial item. That is a change in the law.

What is it that concerns you about that change in the law? Do you fear that it is going to allow contractors to manipulate what is considered a commercial item by creating or reorganizing business entities? Why shouldn't we go along with this change in the law?

Mr. TIEFER. Because what gives commercial quality, as Ms. Styles said, is unrelated; that is, the way 404 works, General Electric sells light bulbs commercially, and so under 404 it can get commercial treatment even if it sells a jet engine that has only one—that is sole-sourced to the Defense Department. The same with United Technologies Co.; it is fairly easy for a mixed Defense Department and commercial company to get out from under it.

I listened to the statements that the IT sector would like to get free from accounting restrictions. The danger with 404 is I see many of its uses for very traditional Defense Department contracting having nothing to do with IT.

Mr. WAXMAN. The bill expands the number of services that can be considered commercial items. We talked about that in terms of 90 percent of its sales, but there are others as well. What are the consequences of this designation? Are they something that we ought to be concerned about?

Mr. TIEFER. Yes. It is the end of full and open competition. Once they are called commercial items, they can be bought without having many of the requirements of full and open competition, which

this is the room in which CICA, in which the requirement of full and open competition was originated in, and apparently it is the room in which that requirement is going to be done away with.

Mr. WAXMAN. Section 402 of the bill specifically permits time-and-materials and labor-hour contracts to be considered commercial items if the services covered by the contracts are commonly sold to the general public through such contracts. Now the DOD Inspector General opposed this section.

He stated, "These time-and-materials and labor-hour contracts are the highest-risk and least-preferred contract types. Under these types of contracts, contractors have little incentive to control costs or increase labor efficiencies. We believe the use of these types of contracts should be discouraged and not encouraged." Do you agree with those comments?

Mr. TIEFER. 100 percent.

Mr. WAXMAN. I have more of a background in health policy than I do in defense policy, but I can tell you, from a health policy perspective, when you have a third party paying the bill, and if you pay whatever the cost may be, there is no incentive to hold down costs. I worry that we are opening the door to this sort of thing for taxpayers' dollars. We had to plug up those loopholes in the Medicare system over and over again.

SARA establishes this Government-industry exchange program for acquisition personnel. The idea is that we are going to get better-trained personnel through this exposure. Should this provision be modified to state that the private sector employees detailed to the Department cannot perform inherently governmental functions, and if we can get such an amendment accepted, is that enough of a safeguard?

Mr. TIEFER. It is the beginning. The problem is that, given that they are 6-month detailees, and then they go back to their permanent company, the notion that they are not going to be loyal to their permanent company all the way through their 6-month Government service period is illusory.

So I don't know that there is anything you can do once you let the fox in the hen house, particularly when they are only there for a short period of time and they are still members in good standing of the "fox association."

Mr. WAXMAN. We all start off with an understanding that we do not have enough acquisition personnel with all the qualifications we want. If we start sending some of them to the private sector at taxpayers' expense, are we going to keep our governmental agencies from having the services that we need from these very same people?

Mr. TIEFER. They are going to be gone. The way the law is written, they have to come back only for the period of time they go out. So they go from the Government to a private company for 6 months. Then they come back; they stay in the Government 6 months. They have seen the greener pastures. They pay their dues and they are out.

Mr. WAXMAN. So the training that we put in will be to train for the private sector employees, not Government employees?

Mr. TIEFER. Oh, I'm sorry, I was thinking about the fox-and-hen-house provision. I lost that.

Well, I have tried to be positive about the training provision.

Chairman TOM DAVIS. You have taken a half-step backward again. [Laughter.]

Mr. WAXMAN. It is just like the stock market; it doesn't go down or up in a straight line. [Laughter.]

There is a sharing-in-savings provision. You have talked about that, but I think it is worth exploring further because we had a provision in the E-Government Act of 2003 which authorized 15 share-in-savings contracts in military departments and 15 in civilian agencies. The idea was that these 30 contracts would serve as pilot projects or demonstration projects.

Now we are, in effect, giving all the agencies permanent authority to enter into an unlimited number of these contracts before any of these pilot projects have even begun. There were a few other pilots in place prior to passage of the E-Government Act. Have there been demonstrable benefits to date? And can you—well, why don't you answer that question first?

Mr. TIEFER. There has not been a demonstration. It is so early. Until that provision was passed, we kept hearing how important it was to try share-in-savings out for information technology. Now the ink is barely dry on that, and we are talking about making it governmentwide.

It is a backdoor mechanism by which non-appropriated money—I think when you use the term "slush fund," you are exactly right—non-appropriated money gets, in effect, borrowed from the contractor. They build it into the premium cost that is in the contract, and then they are funding the Government.

I was struck that Ms. Styles who, as you say, tried to express things in the kindest possible way would use the blunt words, "OMB is opposed." I mean, that is a strong negative from the people who are responsible for the Treasury, for the FISC.

Mr. WAXMAN. Another area where we are trying something out before we know how well it is working is in the Homeland Security Act, where we said that where procuring for defense against terrorism or nuclear, biological, chemical, or radiological attacks, all agencies for 1 year could treat such procurements as commercial acquisitions. This bill would now make these authorities permanent for all agencies.

Can you explain why treating these as commercial items causes you concern?

Mr. TIEFER. Well, it is treating something as commercial which is utterly non-commercial; that is, an item which has never been, and would never be, sold in the private sector receives all the exemptions from competition and safeguards because it gets the commercial status.

What concerns me is this wide—that the terms used for defining this are so wide open that we don't know the limits to which they could be put. One particular example: There was an exchange earlier where Mr. Davis said bluntly, "Well, we can't—of course, cost reimbursement, cost-type contracting isn't available for commercial items." I wish it were clear from the language of the legislation that was true, but it is not clear from the language of the legislation that is true.

The reason I know it is not clear is that, if you look at Angela Styles' testimony, she says: At least we ought to make clear that you can't use this to bring cost-type contracting under this loose commercial arrangement.

So we have no idea how far this authority can be pushed, how far it can be used for even relatively routine contracting throughout the Federal Government. The language is too new.

Chairman TOM DAVIS. Would the gentleman yield for just a second? FASA prohibits the use of cost-type contracts for commercial items. We don't change it. We don't change that. Just for the record, we don't change that.

Mr. TIEFER. I would welcome it if—I mean no——

Chairman TOM DAVIS. No, I understand.

Mr. TIEFER. I strongly suspect from this, Mr. Davis, that you could clarify this bill as it goes along——

Chairman TOM DAVIS. I just wanted to make it clear; that is where we are. If when Mr. Waxman and I sit down we need clarification, we will clarify that. I just want to make our intent clear that is what it is. I appreciate your raising this, and it is the first brush at it. We really do. We solicit a lot of views here in trying to put this together, but I just want to make it clear to everyone watching that this is not the kind of thing that we are trying to do.

Mr. WAXMAN. Well, I appreciate that, and we need to pin things down because in legislation, once it is a law, if we open up a loophole, there are people and businesses that will try to take advantage of that loophole. So I think we have to be very, very careful, especially when we are talking about taxpayers' money. Sometimes we have unintended consequences, and I fear the unintended consequences.

But one area where we have an unintended consequence that I fear would be made more routine is, the transactions dealing with non-traditional contractors. Under current law, we permit the Defense Department to enter into basic, applied, and advanced research contracts without regard to many Federal statutes and regulations. This bill would extend this other transactions authority to all civilian agencies for research and development of projects related to defense against terrorism.

It sounds well-intended, but the other transaction authority that was intended to give the Defense Department greater flexibility in acquiring research and attract non-traditional defense contractors has not, from what I understand, worked. Do you have any sense of this? Have you looked at this, Mr. Tiefer? Should we expand this program? Am I correct in saying it appears that it has not worked?

The Defense Department Inspector General reported these arrangements are subject to waste, fraud, and abuse. So if that is what he thinks, should we be extending them to all civilian agencies?

Mr. TIEFER. You are exactly right, Mr. Waxman. I cited a GAO study of the use of other transaction authority by the Defense Department. They looked at 97 contractors who had such agreements to see whether they were, as we had hoped, non-traditional, unusual, small research shops, or other such non-traditional contractors. And GAO found that, of 97 contractors who had this sort of

wildcard, outside-the-law authority, 84 out of the 97 were traditional defense contractors—84 out of 97.

The authority purports to, but it is no way restricted. It has not been written in such a way that it wouldn't just be a get-out-of-jail-free card for every giant contractor.

Mr. WAXMAN. Businesses in my district want to be able to compete for Government contracts, and they want the rules to be fair, but the thing they want the most—and I hear over and over again—is not to waste taxpayers' dollars, because if taxpayers' dollars are wasted, they have to pay more in taxes, and they lose confidence in Government, and they want Government there to provide the basis for businesses to succeed, businesses to operate. That is the value, the great lesson this country gives to the world, that we have a country that provides a climate for businesses to succeed and prosper, and it does an enormous amount of good for all of us.

So I just want to be sure. As we look at this legislation—I thought the three of you, and I didn't ask you questions—I thought your points were excellent, why we need to make sure that we can encourage businesses to come in and deal with the Government and try to avoid some of the stumbling blocks. It is a balance, and we need to achieve the right balance.

Mr. Chairman, I certainly want to work with you to accomplish that.

Chairman TOM DAVIS. Thank you very much. And let me just say, you talk about unintended consequences. The biggest unintended consequences we have today are the costs of verification and these rules and these regulations and these burdens that we are putting on Contracting Officers and companies that result in nothing except additional and tremendous—tremendous—cost to the American taxpayer.

It is balance, and there is no question that, if we don't have appropriate verification, much of this verification we transfer from the old certifications to the Contracting Officer, but we make it transparent. We train them. The key here is trusting the Contracting Officers, Federal career employees, not politicians, not political appointees, to make the best buying decision for the customer. How we get there is something that we will be talking about as we move——

Mr. WAXMAN. Let's put our trust in the rule of law and have good individuals——

Chairman TOM DAVIS. Sure.

Mr. WAXMAN [continuing]. Administering them, but not repealing the laws and then hoping that the good individuals do what is right.

Mr. WAGNER. Can I add a point to what you just said——

Chairman TOM DAVIS. Yes, sure.

Mr. WAGNER [continuing]. Which I think is very important? At the end of the day, you know, there is going to be an individual decision on how a particular service is going to be purchased, an acquisition. It is part of the acquisition strategy. Whether they use some of the new authorities that we are able to use here or not ought to be part and parcel of that decisionmaking process.

Maybe the decision is that it ought to be a CAS-compliant, you know, fully CAS-compliant contract that meets those types of requirements.

Chairman TOM DAVIS. In fact, I would err on doing that, if we have to make a——

Mr. WAGNER. I almost felt at one point we were saying, well, they have to do it this way and buy it commercially. No. I think that those are decisions that these good, trained people are going to make out there, and we have to trust them to make good decisions. There are going to be some bad, horror stories along the way, and we are going to have lessons learned from it, I think.

Chairman TOM DAVIS. We have it under the current system, too, a lot of them.

Mr. WAGNER. Thank you.

Chairman TOM DAVIS. Thank you very much.

I'm sorry, you have been sitting there patiently, and thank you for being with us.

Mr. RUPPERSBERGER. That's fine, a good discussion.

Mr. WAXMAN. I would like to point out that our colleague, Mr. Ruppersberger, has had the personal experience, sitting as an executive in Baltimore, in dealing with those who come in and apply for contracts who say they will do the work.

Chairman TOM DAVIS. As have I, for the record, in Fairfax County.

Mr. RUPPERSBERGER. And, Mr. Chairman, there is that, too. It is a frustrating process. When you are administrating, you want to get to the bottom line as quickly as you can. You want efficiency. You want to hold people accountable.

But there is a balance, and I think, Mr. Legasey, your comment about the relationship between Government and business and how it is getting stronger, I think that is important. We can't do it alone.

The only issue is that we would like to say we want to run Government like a business, but there are a lot of issues and things that we have to deal with that we can't completely do that. Our shareholders are the voters, and there are a lot of checks and balances.

I think Mr. Waxman said the comment of balance and that balance is important. I think we need to learn from history. If you look in the 1980's, I think there were a lot of abuses of sole-source contracts. As a result of that, there was a lot of investigations that occurred, and then probably the pendulum went too far the other side, and the restrictions were there; it made it almost impossible to do business, to get the right people.

You know, the competitive bid just based on price was ridiculous. You were getting incompetent contractors or you weren't getting anything for your money, and you had to hire somebody else to come in and fix it. I think we have come a long way since then.

What we are trying to do now is to find a way to make it work. Now I do have some concerns. I asked these questions before. When there are not safeguards, when there are not checks and balances and accountability—safeguards, checks and balances, and accountability—I feel very strongly that they have to be a part of the

law that we, hopefully, and a policy that we will set, so that we can all follow that law or policy or procedures.

I will give an example. The contract term, that causes me concern, that you don't have a check and balance and accountability for contract term. Now I am going to mention IBM because my wife worked for IBM in the seventies.

IBM was the greatest corporation in the world. Now they have come back and they are still one of the best, but they had a time when their management really took the wrong road from a policy point of view and they were not able to do and to stay where they needed to be because of a policy decision. Now if IBM had a long-term contract with the Government and we were relying 100 percent on IBM, and when they went through that phase when they had some difficulties, we as a Government would be in a position where we might not have been getting the best.

Yet, it is very difficult for anyone, small business as an example, and a company like yours, Mr. Legasey, in the seventies to compete with IBM because they were so big, so wealthy, and had a great reputation. But they did not during that period, and I am not saying about now because you have come a long way.

I think your President or Chairman *from Baltimore?*

Mr. LEINSTER. Yes, Sam Palmisano.

Mr. RUPPERSBERGER. I am glad to hear that. Do you have any jobs in Baltimore, by the way, Mr Legasey? [Laughter.]

Mr. LEGASEY. Yes, sir.

Mr. RUPPERSBERGER. But I use that as an example because what my concern is, is that you don't have the accountability of performance and that you don't have the incentive to continually do better.

Now, on the other hand, to seek this balance, you don't want to make it such a cumbersome process that it is going to cost you money, time, hours on the Government's side and on the contractor's side, that you have to turn around, and the contract is not the type that you should really recompete every 3 years. You might need 7 years or 8 years, which leads me to an issue, the contract itself.

That is an issue I think we have to look at, the contract itself, the kickout, so to speak, you know, the accountability in the contracts that will allow you to deal with lack of performance and to do it quickly, just like you are saying you want to do it quickly on the other side. I agree, the quicker, the better, but the ability to have kickers and then to roll somebody in right away, that is one issue. And I am making statements instead of questions, but I would like to hear your opinion.

The other thing I think that is important, I am concerned that the commercial items, that we are going too far right now, and that could be an avenue that could be subjected to abuses. I mean, it is so broad.

And even you mentioned about how it doesn't help business. I think, if anything, the commercial items, the way that it is defined here, hurts small businesses. You know, a lot of small businesses don't know how to do Government contracts or get involved, and some of those small businesses, especially in technology, as an example, might have the technology that we need to help our troops or to do what we need to do in homeland security. Usually, I mean,

if you are smart, you are going to come in as a subcontractor with one of the big boys. That is the way I would look at it.

Any comments on what I have said?

Mr. LEINSTER. I guess I would argue that it is those very small businesses that are going to get crippled by these provisions that we are trying to be subjected to, our commercial services.

Listen, when I put together an organization to design and build a weapons system, I will put in place the accounting standards necessary to meet that scrutiny. But when you are buying my commercial services from my commercial divisions, we are not prepared, because we don't have to, to establish and maintain those kinds of rigorous cost accounting standards. We have cost accounting standards, but they don't meet the Government's.

Small businesses, in trying to penetrate this marketplace, I think would be sorely disadvantaged.

Mr. RUPPERSBERGER. Let me ask you this, and then my time is up: But the issue of the contract itself, sometimes we are trying to write laws that could be interpreted one way or another, and we might really be hurting the whole process. Don't you think we really need to look more into the actual contract between the vendor and the Government?

Mr. LEGASEY. I would certainly agree, and the example Ms. Styles gave this morning, that sounds like the biggest case of mismanagement I have ever heard. We are not going to fix that in the law. Where somebody had a seven times overrun, that is not going to get fixed in legislation.

In every time-and-materials contract that my company has ever been engaged in, there is either a limit on the number of hours you can bill or the maximum dollars that are there, and that doesn't get to be seven times what it is without a lot of conscious decisions on the part of people who are involved. And if people are not managing that process in a correct way, then Government is not being served well, and, frankly, the industry is not being served well.

But those are checks and balances and reasonable management things that need to be in place.

Chairman TOM DAVIS. Would the gentleman yield for just a second?

Mr. RUPPERSBERGER. Yes.

Chairman TOM DAVIS. Let me just give you what my experience has been, when these have gone bad, sitting on the contractor side is it is either the Government doesn't know what they want or they changed the requirements in the middle, and so you spend a lot of money going one way and they want you to come back another. That tends to be the Government's fault many times when that happens.

Or sometimes you are just not overseeing these correctly. You need Contracting Officers that ride herd on these contractors, watch it, audit them, and do that. Sometimes there are failures to do that.

That is why this training is such a critical component to making this work. You throw out the training; this bill is worthless, because you are not going to have people out there overseeing. But if you train them right, a trained Contracting Officer can do more

to get the best value for the Government than any rule or regulation that we can write. So that is kind of where we are.

Mr. RUPPERSBERGER. And we agree. Mr. Chairman, I would hope that we could consider somehow focusing part of this bill on the contract itself, and then, in the event that there is lack of performance, a lack of whatever we need to do, and then if there is a— because contracts take a long time, there needs to be a kicker in there somehow that we can move quickly for the benefit of Government, and a procedure that would say, if someone is not performing, if someone is not doing what they need to do, we need to move that contractor out quickly and move to the next arena and get the right person in.

That is what I think needs to be done more than anything, instead of passing a law that somehow will be reinterpreted again. I mean we look at the seventies, the eighties, and we keep going back and forth.

Mr. WAGNER. I just wonder if I can add, I heard this term this morning, "contract for life." Like Ted said this morning with all those sole-source contracts, I don't know where they are and I would love to find them, if they are out there, but I don't think they are out there. [Laughter.]

What you see, generally, on the award-term contracts now are either some annual type of terms that you can add to this, and trust me, there are contracts out there where, if the contractor isn't performing midway into it, if it is a 5-year, it is generally a 1-year plus four 1-year options out there. There are contracts out there right now in year three they are starting to think about recompeting because maybe that particular contractor isn't providing the type of services they want. So I think those safeguards are in there in most of the contracts that we see.

Mr. RUPPERSBERGER. What is the problem then? What is the problem then?

Mr. WAGNER. What's the problem?

Mr. RUPPERSBERGER. What's the problem then? You say they are there. I meant that as a little joke. [Laughter.]

Mr. LEGASEY. As a practical matter, when somebody is not performing well on a contract, the rest of us would like to get that contract and are pretty good about pointing out the fact they are not performing well and trying to stimulate some kind of——

Mr. RUPPERSBERGER. You're all over each other.

Mr. LEGASEY. It is a very competitive industry.

Mr. RUPPERSBERGER. Let me ask you this: If you were so small, most small groups, how do you get involved? How did you do it and you are doing well now?

Mr. LEGASEY. We founded our company in 1978, which was before the Competition in Contracting Act, and we built our company one person, one contract at a time by competing openly long before competition in contracting, simply by trying to write a better proposal and price it appropriately, and then perform well.

Chairman TOM DAVIS. Were you a small business at the time?

Mr. LEGASEY. We were technically a small business, but as a practical matter, in our 25 years of existence we only had two small business contracts. It was not in the domain of interest that we were after. So we competed full and open from the very begin-

ning, and we did it based upon trying to hire people who really understood the customer's problem and really had the right technical solution, and then going in and doing a good job, which is what many people try to do.

But both of us had come out of Government and so understood the workings of Government well. So it wasn't quite as thick a marble wall that we had to get through to understand the rules and regulations, and, therefore, we weren't as intimidated by it, like someone who has not been part of the processes of Government.

Chairman TOM DAVIS. Yes, but they also have been—not blowing smoke—an excellent company in terms of the quality and that kind of thing. That is how you win your share and you keep growing, is through reputation in this business.

Mr. LEGASEY. Thank you, sir.

Chairman TOM DAVIS. Let me ask one other question. It is kind of unrelated to where we are in the bill, but somewhere we may go. We heard some of the members earlier express concern about small business and minority businesses getting a piece of this and bringing up the bundling issue. I think there is a lot of utility in bundling, but the difficulty is that you bundle pieces that used to be reserved for 8(a)'s or for small businesses.

Now what we ask is the prime contractor is to take a piece of that for 8(a), and they would choose their subcontractors and team partners. The difficulty, from a small business, 8(a) perspective, is that many times they don't get the choice pieces or what they thought, and the prime contractor, who is responsible for the overall operation and delivery of the product, will take the choice pieces. There has been a lot of grumbling and complaining, as you can imagine.

And the marketing strategies, instead of going right to the Government and the Contracting Officers there and getting your set-aside, now have to market large firms and network with larger companies.

But it is a concern of a lot of members on this committee and in the Congress, and I think it is something that we may address along the way. I know Representative Collins, I mean Senator Collins, who chairs the committee in the Senate, is concerned. We heard one of our members talk about it today. It is something we need to address.

It may be that what we do is we make this more of a priority as we bundle contracts, to hold accountable the percentages that are going out. Does that give any of you any concern, were we to do that? Mr. Tiefer, I would want to hear your comments about how we do that, too.

I think the utility in bundling is, instead of the Government being the integrator, you let the prime pick their teammates, and I think there is some utility in doing that, but we don't necessarily want to do that at the cost of small businesses and 8(a)'s.

I will start with Mr. Tiefer and go down and see if there is any reaction.

Mr. TIEFER. I would like to mention two things. One is a recent headline in Federal Times, March 31, 2003: Most IT spending goes to large firms.

We have been hearing a lot of what I think is happy talk about how, even under existing law, acquisition reform opens things up to the small business. It is the other way. The trend has been that, as you end full and open competition, as you use these governmentwide, "commercial," vehicles, the contracts go to the—it didn't happen by accident. Most IT spending is now going to large firms.

Chairman TOM DAVIS. It has always been that way. I mean, you have a large, multibillion dollar contract. What are you going to pick? A three-man outfit to do it? I mean, that is the nature of the beast. I don't know if that counts in the subcontractors that they have and their team members as part of that, that they distribute on down.

But my question is, I mean if you could just try to get the question, maybe with stronger oversight, and this may place a regulatory regime to hold people accountable in terms of their final checks and stuff to ensure this is happening, because I think sometimes these contracts, we talk about it and we don't go back and check it to make sure the 8(a)'s and the small businesses are getting the job.

I just want to see, is that an approach that would be reasonable and workable? That is what I am asking.

Mr. TIEFER. Congressman Wynn has introduced in each Congress a bill that would change the 23 percent figure for what small business should get to 25 percent. I heard Mr. Perry at GSA testify earlier today: "Twenty-three percent? That's easy. We are up at 40 percent."

So why not move the figure governmentwide from 23 to 25 percent? That would add a pro-small business provision to this bill.

Chairman TOM DAVIS. But it doesn't address the kind of contracts you are getting, how they are administered, and these businesses market the Government, or, in this case, in bundling network with others. I just want to see if what I have talked about is a workable way, because I don't know how close we are checking this.

Any reaction? It is kind of out of the air, but——

Mr. LEINSTER. Right. The observation that I would make regarding unbundling is that, if it is artificial, I think it is wrong. The steps that are being proposed to make sure that contracts are, indeed, properly bundled—that is, to have them go to a procurement small business advocate within the administration before they are released—again, our concern there is that it will delay the procurement, and delays in the procurement add to the acquisition costs, the cost of pursuing the business.

We are all small business advocates. We use them enormously. We use them in our commercial sector, where we had no Federal regulation to do it. So utilization of small business is an integral part of our strategy for going to market, both in the Federal and the commercial marketplace.

So bundling/unbundling, it is not something we overly concern ourselves with in terms of, would we be alarmed?

Chairman TOM DAVIS. Any other reactions?

Mr. WAGNER. Mr. Chairman, I think at the prime contract level, I think it is a balance. You have to be able to look at what your

goals are in your acquisition strategy, determine what is available for setting aside for small businesses.

Frankly, we have seen in our business some fairly large contracts out there set aside for small businesses, ones that we might look to contract for, $10 and $20 million-type contracts set aside. OK, that is fine. We need to know that up front, and then we go on because there are other things out there to bid.

Mr. LEINSTER. Or we sub to them. [Laughter.]

Mr. WAGNER. On the subcontract level, we have some rigorous requirements in all of our contracts to sub to small, disadvantaged, minority, women-owned businesses, veteran-owned businesses. The requirements continue to grow out there. Anywhere from 25 to upwards of 40 percent of our contract might have to be subcontracted out to small business.

I think if we do a better job of tracking those dollars and accounting for those dollars at the congressional level as well, I think the face of small business contracting out there may actually look a little different.

Mr. LEGASEY. My reading of the study that was quoted—and I did read that study—was that it dealt only with prime contracts. It didn't measure the flowdown to small businesses. Therefore, you really couldn't conclude how many dollars are going to small businesses, only those that are going to small businesses as a prime contractor, which is not the bulk of the money that comes to small businesses.

As has been indicated, in virtually every program of any size that our industry competes for, there is a small business requirement, and those requirements are enforced. Case in point: The largest contract that our company has ever won, which was very recently, there were two things that we were judged to be better than the other company. One was our use of small businesses.

So the Contracting Officer made a significant enough point to say that the way in which we had included small businesses in that contract was a discriminator in a very, very large, multiyear contract. These people are paying attention to this fact, and it is being used. I would agree the data is not there to really show how much it is being used.

A final point on small businesses: To throw a small business out in the cold and ask them to be a prime contractor, when they are really not well-equipped to do it, doesn't serve that small business well because they get their reputation tarnished before they have had a chance to really learn the ropes. Working for a good prime contractor, who is going to mentor them and help them really pick up the business processes that they need and learn how to do business in this environment, is a very, very constructive and important thing to happen.

PSC would like to amplify on our views on small business, if you would take some written commentary from us.

Chairman TOM DAVIS. We would be happy to. Get it as quickly as you can——

Mr. LEGASEY. Yes, sir.

Chairman TOM DAVIS [continuing]. Because we could be marking this up as early as next Tuesday.

Mr. LEGASEY. Yes, sir.

Chairman TOM DAVIS. Well, anything else anybody wants to add?

[No response.]

Chairman TOM DAVIS. Let me just thank all of you for being here today. It has been a spirited discussion.

I know you all have busy schedules, and we appreciate your being here and staying with us through the votes and everything else.

The committee stands adjourned.

[Whereupon, at 1:17 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

[The prepared statements of Hon. Wm. Lacy Clay and Hon. C.A. Dutch Ruppersberger, and additional information submitted for the hearing record follows:]

Statement of the
Honorable William Lacy Clay
Before the
Government Reform Committee
Wednesday, April 30, 2003

"Better Training, Efficiency and Accountability: Services Acquisition Reform for the 21st Century "

Thank you for yielding, Mr. Chairman, simply put the proposed *Services Acquisition Reform Act of 2003 a.k.a. (SARA)* gives federal acquisition managers the discretion to choose the best possible proposal for federal contract and supply procurement. The *SARA* proposal is a continuation of past efforts like the Federal Acquisition Streamlining Act of 1994, and the Clinger-Cohen Act of 1996. Those legislative proposals have been generally effective and welcomed by the individuals responsible for their implementation. There are however systematic flaws in this new proposal. One example would be that the SARA proposal would allow for the downsizing of the federal acquisition workforce and permit the encouragement of private contracting.

Supporters of this legislation have declared that government procurement and acquisition procedures should be more like business. I hear statements like the, "federal government must take advantage of the lessons learned by the private sector and adopt commercial best practices." Supporters have used an array of catchall phrases in their arguments such as Best Practices, and Share-in-Savings which give the impression that business is right and government is always somehow deficient. Personally, I am troubled by the term best practices. Government traditionally has had the overall responsibility to provide certain regulatory efforts to ensure the prevalence of quality and safety in business. It is impossible for business to

successfully regulate itself. Conversely, it is impossible for government to be function like business.

Under the section entitled Contract Incentives of Title III of the proposed Act – contractors would permit the Share-In-Savings stipulation to allow the contractor to bear the initial project costs, including capital outlays until the contractor achieves the desired results. Payment however would be solely based on a percentage of the savings. The problem with this approach is that this form of contracting may constitute enormous problems with future contract auditing and muddle a realization of savings to the intended department or agency. Again, this is another example of the flaws that I mentioned earlier with this legislation.

Finally, Mr. Chairman I welcome change if it is truly for the positive. However, business is business and government is government. For too long there has been an inaccurate comparison between the two. It is important to acknowledge that both have an important place in our society.

I urge my colleagues to give ample thought to comparing and contrasting one against the other simply for comparisons sake. Both entities have a place. As a rebuttal, I would offer this - Government is supposed to be about the people for the people. Business is for profit. America thrives on both but they are diversely different. Someone has to care for all the people. The homeless, the disabled and those that do not have the ability to care for themselves. It cannot be just about the bottom line for the government. One-person one vote is the credo of the government. The government has a duty to be concerned for those that are not in the upper echelons of the income bearing population. Government's duty is to care for all.

Mr. Chairman, I ask unanimous consent to submit my statement into the record.

Congressman C.A. Dutch Ruppersberger
Committee on Government Reform
Hearing on the Service Acquisition Reform Act of 2003: Better Training, Efficiency and Accountability: Services Acquisition Reform for the 21st Century"
04.30.03

Thank you Mr. Chairman for holding this hearing concerning the "Services Acquisition Reform Act of 2003."

As we know the government spends over $200 billion purchasing services.

We have made tremendous progress in the current system. However, now is the time to make more progressive steps toward efficiency in federal procurement. We need to adopt standards that increase efficiency, reduce cost, and ensure quality products for the federal government.

I agree with the intent of the legislation that it is important to have a well trained staff, with updated knowledge on the acquisition marketplace and process.

Yet if we believe the current system of government management lacks efficiency – it is incumbent upon us to find innovative ways to Reform that system.

We should address issues that are plaguing government acquisition including competent training, professionalism and competitiveness. I urge my colleagues to listen and take into account all the concerns that will be presented today by the witnesses.

I look forward to hearing the testimony and look forward to asking questions of the witnesses.

Project On Government Oversight
Watchdog since 1981

April 30, 2003

Dear Government Reform Committee Member,

Chairman Tom Davis will soon reintroduce the Services Acquisition Reform Act (SARA), which continues to contain a number of troubling provisions.

We urge you to exercise caution in approving any of the provisions of SARA which may make significant changes to existing procurement statutes without full consideration of their effects. Some provisions of the newly drafted SARA would broadly affect all types of contracts including defense acquisitions, rather than just service contracts as the title of the bill implies.

Representative Davis' last introduced version of SARA included controversial provisions to dramatically expand the use of government purchase cards despite massive waste, fraud, and abuse in those programs. In an analysis of the new SARA legislation, several provisions were most likely to lead to the fleecing of taxpayer dollars:

- **Encouraging High-Risk Time and Material and Labor Hour Contracts.** The draft of SARA encourages use of time and material, as well as labor hour contracts, which allow contractors to engage in almost unlimited billing of the government without producing a product. This is like hiring a house painter, telling him no matter how long he takes or how much he spends on paint, his bill will be paid. The proposed legislation would even prohibit government auditors from reviewing contractors' costs.

  In March 2002 testimony, the White House Office of Federal Procurement Policy Administrator expressed concerns about this provision: "A contractor has no obligation to deliver a finished product; it must only make best efforts...Given the problems inherent in time-and-material and labor-hour contracts... I am hard-pressed to see how their use will produce beneficial results ...."[1]

  The Department of Defense Inspector General was also critical: "Time and material, and labor hour contracts are the highest risk and least preferred contract types...We believe the use of these types of contracts should be discouraged, not expanded."[2] As was the General Services Administration Inspector General: "Our audit experience has indicated certain recurring problems

[1] "Statement of Angela B. Styles, Administrator for Federal Procurement Policy Before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform," March 7, 2002.

[2] "Inspector General, Department of Defense, Comments on the Service Acquisition Reform Act (H.R. 3832)," March 12, 2002.

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on time-and-materials or labor-hours type contracts. These have included contractors who havenot actually expended the number of hours for which they have billed the Government."[3]

- **Expanding Speculative Share-in-Savings Contracts.** The draft legislation would expand the use of speculative and unproven financing schemes known as share-in-savings contracts. Under share-in-savings contracts, contractors provide capital financing for projects such as computer system upgrades in exchange for receiving funds down the line that are saved as a result of the upgrade. However, developing the baselines to estimate savings is virtually impossible in the technology arena.

  By supporting this proposal, Congress will be ceding its budgetary authority. According to the Department of Defense Inspector General, "Because agencies get to retain funds saved and not paid to contractors, the proposal creates an environment for off budget financing of operations."[4] The White House's procurement chief has testified that share-in-savings programs "have seen no savings."[5] The General Accounting office found that "the government has not identified many suitable candidates for use of this technique."[6]

- **Eliminating Truth in Negotiations Act (TINA) and Cost Accounting Standards (CAS) Protections.** The legislation would exempt many more government contracts from the TINA and CAS requirements. Both TINA and CAS protect the government in cases where a commercial marketplace does not exist -- for example, in the purchase of military aircraft and weapons. Cost Accounting Standards ensure that contractors do not use Enron-like accounting gimmicks to rip off the government. The Truth in Negotiations Act puts the federal government on an even playing field when negotiating sole source and other noncommercial contracts by requiring contractors to disclose cost or pricing data. The proposed legislation would mistakenly direct the government to remove good government protections based on who the company is, rather than what type of transaction is employed, especially where sole source contract awards may be involved.

  In a recent news article, Clark G. Adams, a former project director at the government's Cost Accounting Standards Board called the plan "ridiculous." Steven Schooner, a procurement expert at George Washington University law school, also commented for the article, saying the government "wouldn't be negotiating with contractors on an equal footing" under the Davis draft proposal.[7]

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[3] Written comments on Draft Services Acquisition Reform Act, Inspector General, U.S. General Services Administration, March 5, 2002.

[4] "Inspector General, Department of Defense, Comments on the Service Acquisition Reform Act (H.R. 3832)," March 12, 2002.

[5] "Statement of Angela B. Styles, Administrator for Federal Procurement Policy Before the Subcommittee on Technology and Procurement Policy," Committee on Government Reform, March 7, 2002.

[6] "Contract Management: Taking a Strategic Approach to Improving Services Acquisitions, Statement of William T. Woods, Acting Director, Acquisition and Sourcing Management," March 7, 2002.

[7] "GOP Leader Seeks to Ease Defense Bidding Rules," *Associated Press*, April 8, 2003.

- **Pretending Items Are Commercially Priced That Are Not**. The legislation would qualify services as "commercial" that have never actually been sold in the commercial marketplace. This provision will legislate a "commercial" definition for services that are essentially sold only (or largely) to Federal agencies, without the pricing safeguards and protections that have traditionally provided taxpayers with some minimal assurance that public funds weren't being wasted or abused. Parts and items may be labeled "commercial" as long as they are merely "of a type" *offered* for sale to the general public, even if no such sale ever occurs. For instance, C-130J military transport aircraft have been offered for commercial sale in the past, and while not a single sale was ever made to civilians, oversight was loosened. Similar attempts have been made to classify the C-17 cargo plane as "commercial" items – therefore removing transparency in cost and pricing data. This provision would extend these Alice in Wonderland-like definitions to services.

We urge you to closely examine the legislation and ensure that appropriate controls and oversight are included in any provisions from SARA that are considered by the Committee.

Sincerely,

Danielle Brian
Executive Director